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Thursday, December 12, 2013

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 40, 50, 52, and 70

RIN 3150–AJ23

[NRC–2013–0019]

Miscellaneous Corrections; Corrections

AGENCY: Nuclear Regulatory Commission.

ACTION: Correcting amendments.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) published a final rule in the **Federal Register** on June 7, 2013, to make miscellaneous corrections to its regulations. The final rule contained minor errors in grammar, punctuation, and referencing. This document corrects the final rule by amending the sections that contain these errors.

DATES: This rule is effective on December 12, 2013.

ADDRESSES: Please refer to Docket ID NRC–2013–0019 when contacting the NRC about the availability of information for this document. You may access publicly-available information related to this document by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0019. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this final rule.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Christian Leatherbury, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–287–3419, email: *Christian.LeatherburyDaniels@nrc.gov.*

SUPPLEMENTARY INFORMATION: The NRC published a final rule in the **Federal Register** on June 7, 2013 (78 FR 34245), to make miscellaneous corrections to its regulations in chapter I of Title 10 of the *Code of Federal Regulations* (10 CFR). These changes included revising the name of its human capital office, correcting and adding missing cross-references, correcting grammatical errors, revising language for clarity and consistency, and specifying metric units. The final rule inadvertently included additional errors in grammar and punctuation in 10 CFR 40.36(e)(2), appendix G to 10 CFR part 50, 10 CFR 52.17(b)(2)(ii), and 10 CFR 70.25; and referencing in 10 CFR 52.17(b)(2)(i) and 10 CFR 52.18(f)(2). This document corrects the final rule by revising the sections that contain these errors.

Rulemaking Procedure

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency may waive the normal notice and comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. As authorized by 5 U.S.C. 553(b)(3)(B), the NRC finds good cause to waive notice and opportunity for comment on these amendments because they will have no substantive impact and are of a minor and administrative nature dealing with corrections to certain CFR sections related only to management, organization, procedure, and practice. Specifically, these amendments are to correct grammatical errors and to revise cross-references to comply with the Office of the Federal Register's Document Drafting Handbook. These amendments do not require action by any person or entity regulated by the NRC. Also, the final rule does not change the substantive responsibilities of any person or entity regulated by the NRC. Furthermore, for the reasons stated above, the NRC finds, pursuant to 5 U.S.C. 553(d)(3), that good cause exists to make this rule effective upon publication of this notice.

List of Subjects

10 CFR Part 40

Criminal penalties, Government contracts, Hazardous materials transportation, Nuclear materials, Reporting and recordkeeping requirements, Source material, Uranium.

10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 52

Administrative practice and procedure, Antitrust, Backfitting, Combined license, Early site permit, Emergency planning, Fees, Inspection, Limited work authorization, Nuclear power plants and reactors, Probabilistic risk assessment, Prototype, Reactor siting criteria, Redress of site, Reporting and recordkeeping requirements, Standard design, Standard design certification.

10 CFR Part 70

Criminal penalties, Hazardous materials transportation, Material control and accounting, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 40, 50, 52, and 70.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

■ 1. The authority citation for part 40 continues to read as follows:

Authority: Atomic Energy Act secs. 11(e)(2), 62, 63, 64, 65, 81, 161, 181, 182, 183, 186, 193, 223, 234, 274, 275 (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2231, 2232, 2233, 2236, 2243, 2273, 2282, 2021, 2022); Energy Reorganization Act secs. 201, 202, 206 (42 U.S.C. 5841, 5842, 5846); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109–59, 119 Stat. 594 (2005).

Section 40.7 also issued under Energy Reorganization Act sec. 211, Pub. L. 95–601, sec. 10, as amended by Pub. L. 102–486, sec. 2902 (42 U.S.C. 5851). Section 40.31(g) also issued under Atomic Energy Act sec. 122 (42 U.S.C. 2152). Section 40.46 also issued under Atomic Energy Act sec. 184 (42 U.S.C. 2234). Section 40.71 also issued under Atomic Energy Act sec. 187 (42 U.S.C. 2237).

■ 2. In § 40.36, paragraph (e)(2) introductory text, revise the fifth sentence to read as follows:

§ 40.36 Financial assurance and recordkeeping for decommissioning.

* * * * *

(e) * * *

(2) * * * For commercial companies that do not issue bonds, a guarantee of funds by the applicant or licensee for decommissioning costs may be used if the guarantee and test are as contained in appendix D to part 30 of this chapter. * * *

* * * * *

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

■ 3. The authority citation for part 50 continues to read as follows:

Authority: Atomic Energy Act secs. 102, 103, 104, 105, 147, 149, 161, 181, 182, 183, 186, 189, 223, 234 (42 U.S.C. 2132, 2133, 2134, 2135, 2167, 2169, 2201, 2231, 2232, 2233, 2236, 2239, 2273, 2282); Energy Reorganization Act secs. 201, 202, 206 (42 U.S.C. 5841, 5842, 5846); Nuclear Waste Policy Act sec. 306 (42 U.S.C. 10226); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 194 (2005). Section 50.7 also issued under Pub. L. 95–601, sec. 10, as amended by Pub. L. 102–486, sec. 2902 (42 U.S.C. 5851). Section 50.10 also issued under Atomic Energy Act secs. 101, 185 (42 U.S.C. 2131, 2235); National Environmental Policy Act sec. 102 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under Atomic Energy Act sec. 108 (42 U.S.C. 2138).

Sections 50.23, 50.35, 50.55, and 50.56 also issued under Atomic Energy Act sec. 185 (42 U.S.C. 2235). Appendix Q also issued under National Environmental Policy Act sec. 102 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415 (42 U.S.C. 2239). Section 50.78 also issued under Atomic Energy Act sec. 122 (42 U.S.C. 2152). Sections 50.80–50.81 also issued under Atomic Energy Act sec. 184 (42 U.S.C. 2234).

■ 4. In appendix G to part 50, section IV, paragraph A.2.c., revise the first sentence to read as follows:

Appendix G to Part 50—Fracture Toughness Requirements

* * * * *

IV. * * *

A. * * *

2. * * *

c. The minimum temperature requirements given in table 1 pertain to the controlling material, which is either the material in the closure flange or the material in the beltline region with the highest reference temperature. * * *

* * * * *

PART 52—LICENSES, CERTIFICATIONS, AND APPROVALS FOR NUCLEAR POWER PLANTS

■ 5. The authority citation for part 52 continues to read as follows:

Authority: Atomic Energy Act secs. 103, 104, 147, 149, 161, 181, 182, 183, 185, 186, 189, 223, 234 (42 U.S.C. 2133, 2201, 2167, 2169, 2232, 2233, 2235, 2236, 2239, 2282); Energy Reorganization Act secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (2005).

■ 6. In § 52.17, revise paragraphs (b)(2)(i) and (ii) to read as follows:

§ 52.17 Contents of applications; technical information.

* * * * *

(b) * * *

(2) * * *

(i) Propose major features of the emergency plans, in accordance with the pertinent standards of § 50.47 of this chapter and the requirements of appendix E to part 50 of this chapter, such as the exact size and configuration of the emergency planning zones, for review and approval by the NRC, in consultation with the Federal Emergency Management Agency (FEMA) in the absence of complete and integrated emergency plans; or

(ii) Propose complete and integrated emergency plans for review and approval by the NRC, in consultation with FEMA, in accordance with the applicable standards of § 50.47 of this chapter and the requirements of appendix E to part 50 of this chapter. To the extent approval of emergency plans is sought, the application must contain the information required by § 50.33(g) and (j) of this chapter.

* * * * *

■ 7. In § 52.18, revise the last sentence to read as follows:

§ 52.18 Standards for review of applications.

* * * The Commission shall determine, after consultation with FEMA, whether the information required of the applicant by § 52.17(b)(1) shows that there is not significant impediment to the development of emergency plans that cannot be mitigated or eliminated by measures proposed by the applicant, whether any major features of emergency plans submitted by the applicant under § 52.17(b)(2)(i) are acceptable in accordance with the applicable standards of § 50.47 of this chapter and the requirements of appendix E to part 50 of this chapter, and whether any emergency plans submitted by the applicant under § 52.17(b)(2)(ii) provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

■ 8. The authority citation for part 70 continues to read as follows:

Authority: Atomic Energy Act secs. 51, 53, 161, 182, 183, 193, 223, 234 (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2243, 2273, 2282, 2297f); secs. 201, 202, 204, 206, 211 (42 U.S.C. 5841, 5842, 5845, 5846, 5851); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 194 (2005).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161).

Section 70.21(g) also issued under Atomic Energy Act sec. 122 (42 U.S.C. 2152). Section 70.31 also issued under Atomic Energy Act sec. 57(d) (42 U.S.C. 2077(d)). Sections 70.36 and 70.44 also issued under Atomic Energy Act sec. 184 (42 U.S.C. 2234). Section 70.81 also issued under Atomic Energy Act secs. 186, 187 (42 U.S.C. 2236, 2237). Section 70.82 also issued under Atomic Energy Act sec. 108 (42 U.S.C. 2138).

■ 9. In § 70.25, paragraph (f)(2) introductory text, revise the fourth sentence to read as follows:

§ 70.25 Financial assurance and recordkeeping for decommissioning.

* * * * *

(f) * * *

(2) * * * For commercial corporations that issue bonds, a guarantee of funds by the applicant or licensee for decommissioning costs based on a financial test may be used if the guarantee and test are as contained

in appendix C to part 30 of this chapter. * * *

* * * * *

Dated at Rockville, Maryland, this 6th day of December, 2013.

For the Nuclear Regulatory Commission.

Cindy Bladey,

Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration.

[FR Doc. 2013–29694 Filed 12–11–13; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2013–1036; Special Conditions No. 25–510–SC]

Special Conditions: Cessna Model 750 Series Airplanes; Aircraft Electronic System Security Protection From Unauthorized External Access

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special condition; request for comments.

SUMMARY: These special conditions are issued for the Cessna Model 750 Series airplanes. These airplanes will have a novel or unusual design feature associated with the architecture and connectivity capabilities of the airplanes' computer systems and networks. Connectivity to, or access by, external systems and networks may result in security vulnerabilities to the airplanes' systems.

DATES: The effective date of these special conditions is December 12, 2013. We must receive your comments by January 27, 2014.

ADDRESSES: Send comments identified by docket number [FAA–2013–XXXX] using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.

Mail: Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC, 20590–0001.

Hand Delivery or Courier: Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 8 a.m. and 5 p.m., Monday through Friday, except federal holidays.

Fax: Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov/.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Varun Khanna, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–1298; facsimile 425–227–1149.

SUPPLEMENTARY INFORMATION: The proposed network architecture includes the following connectivity between systems:

1. Airplane control, communication, display, monitoring and navigation systems,
2. Operator business and administrative support systems, and
3. Passenger entertainment systems, and access by systems external to the airplane.

The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

The FAA has determined that notice of, and opportunity for prior public comment on, these special conditions are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. The FAA has also determined that notice of these special conditions is unnecessary because the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon publication in the **Federal Register**.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On September 10, 2010, Cessna Aircraft Company applied for an amendment to the Model 750 Type Certificate No. T00007WI.

The Model 750 is a twin-engine pressurized executive jet airplane with standard seating provisions for 14 passenger/crew. This airplane will have a maximum takeoff weight of 36,600 pounds with a wingspan of 69.2 feet, a maximum operating altitude of 51,000 feet, and will have two aft-mounted Rolls-Royce AE3007C2 engines.

The proposed Cessna Model 750 avionics architecture is novel or unusual for executive jet airplanes by allowing connection to airplane electronic systems and networks, and access from aircraft external sources (e.g., wireless devices, Internet connectivity) to the previously isolated airplane electronic assets. Cessna's proposed design is considered by the FAA to be an architecture which introduces potential security risks and vulnerabilities not addressed in current regulations and aircraft-level or system-level safety assessment methods. Consequently, this special condition has been produced to address security and safety issues arising from the use of this type of architecture, and foreseeable flight and maintenance applications impacted by these interconnected data networks and the addition of external access points.

Type Certification Basis

Under Title 14, Code of Federal Regulations (14 CFR) 21.17, Cessna must show that the Model 750 series meets the applicable provisions of 14 CFR part 25, as amended by Amendments 25–1 through 25–128. The certification basis for the 750 (S/N -000501 and on) is documented and agreed to within the Cessna Aircraft Company Model 750 Block Point Change G–1 Issue Paper.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model 750 series because of a novel or unusual design feature, special conditions are prescribed under § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, the proposed special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and proposed special conditions, the Cessna Model 750 series airplane must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36 and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, under § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The Cessna Model 750 will incorporate the following novel or unusual design features: digital systems architecture composed of several connected networks. The proposed architecture and network configuration may be used for, or interfaced with, a diverse set of functions, including:

1. Flight-safety related control, communication, display, monitoring, and navigation systems (aircraft control functions);
2. Operator business and administrative support (operator information services);
3. Passenger information and entertainment systems (passenger entertainment services); and,
4. The capability to allow access to or by systems external to the airplane.

Discussion

The architecture and network configuration in the Cessna Model 750 Series airplanes may allow increased connectivity to, or access by, external airplane sources, airline operations, and maintenance systems to the aircraft control functions and airline information services. The aircraft control functions and airline information services perform functions required for the safe operation and maintenance of the airplane. Previously these functions and services had very limited connectivity with external sources. The architecture and network configuration may allow the exploitation of network security vulnerabilities resulting in intentional or unintentional destruction, disruption, degradation, or exploitation of data, systems, and networks critical to the safety and maintenance of the airplane. This configuration may also include the electronic transmission of field-loadable software (and hardware) applications and databases to the airplane, which would subsequently be loaded into the safety-related equipment and systems. The existing regulations and guidance material did not anticipate these types of airplane system architectures. Furthermore, 14 CFR regulations and current system safety assessment policy and techniques do not address potential security vulnerabilities, which could be exploited by unauthorized access to airplane systems, data buses, and servers. Therefore, these special conditions are issued to ensure that the security (i.e., confidentiality, integrity, and availability) of airplane systems is not compromised by unauthorized wired or wireless electronic connections.

For the reasons discussed above, these special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Cessna Model 750 Series airplanes. Should Cessna apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model series of airplanes. It is not a rule of general applicability.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, the FAA has determined that prior public notice and comment are unnecessary, and good cause exists for adopting these special conditions upon publication in the **Federal Register**. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Cessna Model 750 Series airplanes.

System Security Protection for Aircraft Control Domain and Information Services Domain From External Access

1. The applicant must ensure airplane electronic system security protection from access by unauthorized sources external to the airplane, including those possibly caused by maintenance activity.

2. The applicant must ensure that electronic system security threats are identified and assessed, and that effective electronic system security protection strategies are implemented to protect the airplane from all adverse impacts on safety, functionality, and continued airworthiness.

3. The applicant must establish appropriate procedures to allow the operator to ensure that continued airworthiness of the aircraft is maintained, including all post-type-certification modifications that may have an impact on the approved electronic system security safeguards.

Issued in Renton, Washington, on December 4, 2013.

John P. Piccola, Jr.,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–29684 Filed 12–11–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2013–1037; Special Conditions No. 25–509–SC]

Special Conditions: Cessna Model 750 Series Airplanes; Aircraft Electronic System Security Isolation or Protection From Internal Access

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special condition; request for comments.

SUMMARY: These special conditions are issued for the Cessna Model 750 series airplanes. These airplanes will have novel or unusual design features associated with connectivity of the passenger service computer systems to the airplane critical systems and data networks.

DATES: The effective date of these special conditions is December 12, 2013. We must receive your comments by January 27, 2014.

ADDRESSES: Send comments identified by docket number FAA–XXXX–XXXX using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.

Mail: Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC, 20590–0001.

Hand Delivery or Courier: Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

Fax: Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov/.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Varun Khanna, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–1298; facsimile 425–227–1149.

SUPPLEMENTARY INFORMATION: The network architecture is composed of several connected networks including the following:

1. Flight-safety related control and navigation systems,
2. Operator business and administrative support, and
3. Passenger entertainment.

The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

The FAA has determined that notice of, and opportunity for prior public comment on, these special conditions are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon publication in the **Federal Register**.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On September 10, 2010, Cessna applied for a change to Type Certificate No. T00007WI in the digital systems architecture in the Cessna Model 750 series airplanes.

The Model 750 is a twin-engine pressurized executive jet airplane with standard seating provisions for 14 passenger/crew. This airplane will have a maximum takeoff weight of 36,600 pounds with a wingspan of 69.2 feet, a maximum operating altitude of 51,000 feet, and will have two aft-mounted Rolls-Royce AE3007C2 engines.

The proposed Cessna Model 750 architecture is novel or unusual for executive jet airplanes by allowing connection to previously isolated data networks connected to systems that perform functions required for the safe operation of the airplane. This proposed data network and design integration may result in security vulnerabilities from intentional or unintentional corruption of data and systems critical to the safety and maintenance of the airplane. The existing regulations and guidance material did not anticipate this type of system architecture or electronic access to aircraft systems. Furthermore, regulations and current system safety assessment policy and techniques do not address potential security vulnerabilities, which could be caused by unauthorized access to aircraft data buses and servers. The intent of these special conditions is to ensure that security, integrity, and availability of aircraft systems are not compromised by certain wired or wireless electronic connections between airplane data busses and networks. A separate Cessna Model 750 project special condition addresses aircraft electronic system security protection from unauthorized external access.

Type Certification Basis

Under Title 14, Code of Federal Regulations (14 CFR) 21.17, Cessna must show that the Model 45 series meets the applicable provisions of 14 CFR part 25, as amended by Amendments 25–1 through 25–128.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model 45 series because of a novel or unusual design feature, special conditions are prescribed under § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, the proposed special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and proposed special conditions, the Cessna Model 750 series airplane must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36 and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, under § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The Cessna Model 750 will incorporate the following novel or unusual design features.

The proposed architecture and network configuration may be used for, or interfaced with, a diverse set of functions, including:

1. Flight-safety related control, communication, and navigation systems (aircraft control domain);
2. Operator business and administrative support (operator information domain); and
3. Passenger information and entertainment systems (passenger entertainment domain).

In addition, the operating systems (OS) for current aircraft systems are usually and historically proprietary. Therefore, they are not as susceptible to corruption from worms, viruses, and other malicious actions as more widely used commercial operating systems because access to the design details of these proprietary OS is limited to the system developer and aircraft integrator. Some systems installed on the Cessna Model 750 series airplanes will use operating systems that are widely used and commercially available from third party software suppliers. The security vulnerabilities of these operating systems may be more widely known than proprietary operating systems currently used by avionics manufacturers.

Discussion

The integrated network configurations in the Cessna Model 750 series airplanes may allow increased connectivity with external network sources and will have more interconnected networks and systems, such as passenger entertainment and information services than previous airplane models. This may allow the exploitation of network security vulnerabilities and increased risks potentially resulting in unsafe conditions for the airplanes and occupants. This potential exploitation of security vulnerabilities may result in intentional or unintentional destruction, disruption, degradation, or exploitation of data and systems critical to the safety and maintenance of the airplane.

Cessna Aircraft Company should develop instructions for the operators to maintain the built-in security safeguards after the airplane enters commercial service. The instructions should address physical security, operational security, audit and monitoring of the effectiveness of security safeguards and key management procedures. A test plan should also be developed and implemented to insure that security requirements are met and there is no inadvertent or malicious change to any system, software or data.

The existing regulations and guidance material did not anticipate these types of system architectures. Furthermore, 14 CFR regulations and current system safety assessment policy and techniques do not address potential security vulnerabilities which could be exploited by unauthorized access to airplane networks and servers. Therefore, these special conditions are being issued to ensure that the security (i.e., confidentiality, integrity, and availability) of airplane systems is not compromised by unauthorized wired or wireless electronic connections between airplane systems and the passenger entertainment services.

For the reasons discussed above, these special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Cessna Model 750 series airplanes. Should Cessna apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model series of airplanes. It is not a rule of general applicability.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon publication in the **Federal Register**. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Cessna Model 750 series airplanes.

Isolation or Security Protection of the Aircraft Control Domain and the Information Services Domain From the Passenger Services Domain

1. The applicant must ensure that the design provides isolation from, or airplane electronic system security protection against, access by unauthorized sources internal to the airplane. The design must prevent inadvertent and malicious changes to, and all adverse impacts upon, airplane equipment, systems, networks, or other assets required for safe flight and operations.

2. The applicant must establish appropriate procedures to allow the operator to ensure that continued airworthiness of the aircraft is maintained, including all post-type-certification modifications that may have an impact on the approved electronic system security safeguards.

Issued in Renton, Washington, on December 4, 2013.

John P. Piccola, Jr.,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–29683 Filed 12–11–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30932; Amdt. No. 3567]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective December 12, 2013. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 12, 2013.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability—All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit *http://www.nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Richard A. Dunham III, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) Telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or revoking SIAPS, Takeoff Minimums and/or ODPS. The complete regulators description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The applicable FAA Forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, in addition to their complex nature and the need for a special format make publication in the **Federal Register** expensive and impractical. Furthermore, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their depiction on charts printed by publishers of aeronautical materials. The advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA forms is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs and the effective dates of the, associated Takeoff Minimums and ODPs. This amendment also identifies the airport and its location, the procedure, and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as contained in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPS and Takeoff Minimums and ODPS, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPS contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPS and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedures before adopting these SIAPS, Takeoff Minimums and ODPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26,1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (air).

Issued in Washington, DC, on November 22, 2013.

John Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and/or Takeoff Minimums and/or Obstacle Departure Procedures effective at 0902 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 9 January 2014

Little Rock, AR, Bill and Hillary Clinton National/Adams Field, RNAV (GPS) RWY 18, Amdt 1B
Springdale, AR, Springdale Muni, RNAV (GPS) RWY 36, Amdt 1C
Twentynine Palms, CA, Twentynine Palms, RNAV (GPS) RWY 26, Amdt 2
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 16R, Amdt 1A
Denver, CO, Denver Intl, RNAV (GPS) Y RWY 34L, Amdt 2A
Sullivan, IN, Sullivan County, VOR/DME–A, Amdt 2, CANCELED
McPherson, KS, McPherson, NDB RWY 18, Amdt 1, CANCELED
Gothenburg, NE., Quinn Field, NDB–A, Orig, CANCELED
Olean, NY, Cattaraugus County-Olean, Takeoff Minimums and Obstacle DP, Amdt 3
Sevierville, TN, Gatlinburg-Pigeon Forge, VOR/DME RWY 10, Amdt 6A
Nacogdoches, TX, A L Mangham JR. Rgnl, ILS OR LOC RWY 36, Amdt 3A
Land O'Lakes, WI, Kings Land O'Lakes, NDB RWY 14, Orig, CANCELED
Land O'Lakes, WI, Kings Land O'Lakes, NDB RWY 32, Orig, CANCELED

Effective 6 February 2014

Haines, AK, Haines, Takeoff Minimums and Obstacle DP, Orig, CANCELED
Sacramento, CA, Sacramento Executive, ILS OR LOC RWY 2, Amdt 24A
Sacramento, CA, Sacramento Executive, RNAV (GPS) RWY 2, Orig-A
Sacramento, CA, Sacramento Executive, VOR RWY 2, Amdt 10A
San Diego/El Cajon, CA, Gillespie Field, RNAV (GPS) RWY 17, Amdt 2A
Greeley, CO, Greeley-Weld County, VOR–A, Amdt 9A
Homestead, FL, Homestead General Aviation, RNAV (GPS) RWY 28, Orig
Zephyrhills, FL, Zephyrhills Muni, NDB RWY 4, Amdt 1A, CANCELED
Zephyrhills, FL, Zephyrhills Muni, RNAV (GPS) RWY 4, Orig-B, CANCELED
Zephyrhills, FL, Zephyrhills Muni, RNAV (GPS) RWY 22, Orig-A, CANCELED
Hilo, HI, Hilo Intl, RNAV (GPS) RWY 21, Orig-A
Chicago, IL, Chicago Midway Intl, RNAV (GPS) Z RWY 22L, Orig
Chicago, IL, Chicago Midway Intl, RNAV (RNP) Y RWY 22L, Orig
Chicago, IL, Chicago Midway Intl, VOR/DME RNAV OR GPS RWY 22L, Amdt 3C, CANCELED
Taylorville, IL, Taylorville Muni, NDB RWY 18, Amdt 4A, CANCELED
Gladwin, MI, Gladwin Zettel Memorial, NDB RWY 27, Amdt 4, CANCELED
Romeo, MI, Romeo State, VOR/DME–A, Amdt 8, CANCELED
Minneapolis, MN, Minneapolis-St Paul Intl/Wold-Chamberlain, RNAV (GPS) RWY 4, Amdt 2A
Clinton, NC, Clinton-Sampson County, RNAV (GPS) Z RWY 24, Orig-A
Teterboro, NJ, Teterboro, RNAV (GPS) X RWY 6, Amdt 1
Brockport, NY, Ledgedale Airpark, RNAV (GPS) RWY 28, Amdt 1A
Prineville, OR, Prineville, NDB RWY 10, Amdt 1
Prineville, OR, Prineville, RNAV (GPS) RWY 10, Amdt 1
Prineville, OR, Prineville, RNAV (GPS) RWY 28, Amdt 1
Beaumont/Port Arthur, TX, Jack Brooks Rgnl, ILS OR LOC RWY 12, Amdt 23A
Omak, WA, Omak, Takeoff Minimums and Obstacle DP, Amdt 1

[FR Doc. 2013–29308 Filed 12–11–13; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30933; Amdt. No. 3568]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective December 12, 2013. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the **Federal Register** as of December 12, 2013.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue SW., Washington, DC 20591;
2. The FAA Regional Office of the region in which the affected airport is located;
3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,
4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability—All SIAPs are available online free of charge. Visit nfdc.faa.gov to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue SW., Washington, DC 20591; or
2. The FAA Regional Office of the region in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Richard A. Dunham III, Flight Procedure Standards Branch (AFS–420) Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (FDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of Title 14 of the Code of Federal Regulations.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAP and the corresponding effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP as modified by FDC/P–NOTAMs.

The SIAPs, as modified by FDC P–NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ‘‘significant regulatory action’’ under Executive Order 12866; (2) is not a ‘‘significant rule’’ under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on November 22, 2013.

John Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, Part 97, 14 CFR part 97, is amended by amending Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

* * * *Effective Upon Publication*

AIRAC Date	State	City	Airport	FDC No.	FDC date	Subject
1/9/14	WA	Spokane	Felts Field	3/0131	11/15/13	RNAV (GPS) RWY 4L, Amdt 1.
1/9/14	WI	Madison	Dane County Rgnl-Truax Field.	3/1049	11/20/13	VOR RWY 18, Amdt 1A.
1/9/14	WI	Madison	Dane County Rgnl-Truax Field.	3/1063	11/20/13	VOR/DME OR TACAN RWY 18, Amdt 1B.
1/9/14	TX	Dallas	Addison	3/1575	11/15/13	ILS OR LOC RWY 15, Amdt 11.
1/9/14	TX	Dallas	Addison	3/1582	11/15/13	ILS OR LOC RWY 33, Amdt 3.
1/9/14	TX	Dallas	Addison	3/1599	11/15/13	RNAV (GPS) RWY 15, Amdt 1.
1/9/14	TX	Dallas	Addison	3/1617	11/15/13	RNAV (GPS) RWY 33, Amdt 1.
1/9/14	OH	Cleveland	Cleveland-Hopkins Intl	3/4020	11/15/13	ILS OR LOC RWY 6R, ILS RWY 6R (SA CAT II), Amdt 21A.
1/9/14	OH	Cleveland	Cleveland-Hopkins Intl	3/4023	11/15/13	ILS OR LOC RWY 24L, ILS RWY 24L (SA CAT II), Amdt 22A.
1/9/14	OH	Cleveland	Cleveland-Hopkins Intl	3/4029	11/15/13	ILS OR LOC/DME RWY 24R, ILS RWY 24R (SA CAT I), ILS RWY 24R (CAT II & III), Amdt 5A.
1/9/14	OH	Cleveland	Cleveland-Hopkins Intl	3/4053	11/15/13	RNAV (GPS) RWY 24R, Amdt 3A.
1/9/14	OH	Cleveland	Cleveland-Hopkins Intl	3/4058	11/15/13	LDA/DME RWY 24L, Amdt 1B.
1/9/14	OH	Cleveland	Cleveland-Hopkins Intl	3/4059	11/15/13	RNAV (GPS) RWY 24L, Amdt 3A.
1/9/14	OH	Cleveland	Cleveland-Hopkins Intl	3/4064	11/15/13	RNAV (GPS) RWY 6R, Amdt 2B.
1/9/14	OH	Cleveland	Cleveland-Hopkins Intl	3/4069	11/15/13	LDA/DME RWY 6R, Amdt 1B.
1/9/14	OH	Cleveland	Cleveland-Hopkins Intl	3/4070	11/15/13	RNAV (GPS) RWY 6L, Amdt 1B.
1/9/14	OK	Hugo	Stan Stamper Muni	3/4154	11/15/13	NDB OR GPS RWY 35, Amdt 1.
1/9/14	OH	Cleveland	Cleveland-Hopkins Intl	3/4237	11/15/13	ILS OR LOC RWY 6L, ILS RWY 6L (CAT II & III), Amdt 2D.

AIRAC Date	State	City	Airport	FDC No.	FDC date	Subject
1/9/14	IA	Sibley	Sibley Muni	3/4251	11/15/13	NDB OR GPS RWY 35, Amdt 1A.
1/9/14	IA	Sibley	Sibley Muni	3/4252	11/15/13	NDB OR GPS RWY 17, Amdt 1B.
1/9/14	CA	Crescent City	Jack McNamara Field	3/5300	11/15/13	ILS OR LOC/DME RWY 11, Amdt 8.
1/9/14	CA	Montague	Montague/Siskiyou County	3/5899	11/20/13	Takeoff Minimums and (Obstacle) DP, Amdt 2.
1/9/14	CA	Montague	Montague/Siskiyou County	3/5905	11/20/13	NDB OR GPS–A, Amdt 7.
1/9/14	IN	Kentland	Kentland Muni	3/6824	11/15/13	VOR/DME RNAV OR GPS RWY 27, Orig.
1/9/14	CA	Hawthorne	Jack Northrop Field/Hawthorne Muni.	3/8749	11/15/13	RNAV (GPS) RWY 25, Orig.
1/9/14	CA	Hawthorne	Jack Northrop Field/Hawthorne Muni.	3/8750	11/15/13	LOC RWY 25, Amdt 11A.
1/9/14	CA	San Bernadino	San Bernadino Intl	3/8757	11/15/13	NDB RWY 6, Amdt 1.
1/9/14	CA	Los Angeles	Los Angeles Intl	3/8758	11/15/13	RNAV (GPS) Y RWY 24L, Amdt 2.
1/9/14	CA	Los Angeles	Los Angeles Intl	3/8759	11/15/13	RNAV (GPS) Y 25L, Amdt 3.
1/9/14	CA	Los Angeles	Los Angeles Intl	3/8762	11/15/13	ILS OR LOC RWY 25R, Amdt 17A.
1/9/14	CA	Los Angeles	Los Angeles Intl	3/8764	11/15/13	RNAV (RNP) Z RWY 24L, Amdt 1A.
1/9/14	CA	Los Angeles	Los Angeles Intl	3/8768	11/15/13	RNAV (GPS) Y RWY 24R, Amdt 1.
1/9/14	CA	Los Angeles	Los Angeles Intl	3/8775	11/15/13	RNAV (RNP) Z RWY 24R, Orig-A.
1/9/14	CA	Los Angeles	Los Angeles Intl	3/8779	11/15/13	RNAV (GPS) RWY 25R, Amdt 2.
1/9/14	CA	Los Angeles	Los Angeles Intl	3/8785	11/15/13	RNAV (RNP) Z RWY 25L, Amdt 1.
1/9/14	CA	Los Angeles	Los Angeles Intl	3/8789	11/15/13	ILS OR LOC RWY 24L, Amdt 26.

[FR Doc. 2013–29309 Filed 12–11–13; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 130809700–3700–01]

RIN 0694–AF96

Addition of Certain Persons to the Entity List; Amendment of Entity List Entries; and Removal of One Person From the Entity List Based on a Removal Request

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule amends the Export Administration Regulations (EAR) by adding thirty-six persons under forty-six entries to the Entity List, revising three existing entries, and removing one entry. The persons who are added to the Entity List have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States. These persons will be listed on the Entity List under the following destinations: Armenia, Canada, China, Germany, Greece, Hong Kong, Iran, Malaysia, Thailand, Turkey, and the United Arab Emirates (U.A.E.). This rule is also revising one existing entry under Sweden to correct the entry by providing an address for this listed person under the destination of Estonia, and revising two entries in Canada, the first by removing two addresses, and the second by updating an address. Lastly, this rule removes one person in Russia from the Entity List. This person is being removed from the Entity List as a result of a request for removal submitted by the person, a review of information provided in the removal request in accordance with the procedures for requesting removal or modification of an Entity List entity, and further review conducted by the ERC.

DATES: *Effective Date:* This rule is effective December 12, 2013.

FOR FURTHER INFORMATION CONTACT: Karen Nies-Vogel, Chair, End-User Review Committee, Office of the Assistant Secretary, Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Fax: (202) 482–3911, Email: *ERC@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Entity List (Supplement No. 4 to Part 744) notifies the public about entities that have engaged in activities that could result in an increased risk of the diversion of exported, reexported or transferred (in-country) items to weapons of mass destruction (WMD) programs. Since its initial publication, grounds for inclusion on the Entity List have expanded to include activities sanctioned by the State Department and activities contrary to U.S. national security or foreign policy interests, including terrorism and export control violations involving abuse of human rights. Certain exports, reexports, and transfers (in-country) to entities identified on the Entity List require licenses from BIS and are usually subject to a policy of denial. The availability of license exceptions in such transactions is very limited. The license review policy for each entity is identified in the license review policy column on the Entity List and the availability of license exceptions is noted in the **Federal Register** notices adding persons to the Entity List. BIS places entities on the Entity List based on certain sections of part 744 (Control Policy: End-User and End-Use Based) of the EAR.

The End-user Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List. The ERC makes all decisions to add an entry to the Entity List by majority vote and all decisions to remove or modify an entry by unanimous vote.

ERC Entity List Decisions

Additions to the Entity List

This rule implements the decision of the ERC to add thirty-six persons under forty-six entries to the Entity List on the basis of § 744.11 (License requirements that apply to entities acting contrary to the national security or foreign policy interests of the United States) of the EAR. The forty-six entries added to the Entity List consist of one entry in Armenia, two entries in Canada, four entries in China, one entry in Germany, two entries in Greece, five entries in Hong Kong, five entries in Iran, four entries in Malaysia, four entries in Thailand, eleven entries in Turkey, and seven entries in the U.A.E. There are 46 entries to address 36 persons because seven of the persons are being listed under multiple countries, resulting in the additional ten entries. Specifically, these ten additional entries cover one person in Canada who also has addresses in Iran and the U.A.E. (resulting in two additional entries for the Iranian and U.A.E. addresses), one person in China who also has an address in Hong Kong (resulting in one additional entry for the Hong Kong address), two persons in Greece who also have addresses in Turkey (resulting in two additional entries for the Turkish addresses), two persons in Hong Kong who also have addresses in Iran and Malaysia (resulting in four additional entries for the Iranian and Malaysian addresses), and one person in Iran who also has an address in Thailand (resulting in one additional entry for the Thai addresses).

The ERC reviewed § 744.11(b) (Criteria for revising the Entity List) in making the determination to add these thirty-six persons under forty-six entries to the Entity List. Under that paragraph, persons for whom there is reasonable cause to believe, based on specific and articulable facts, that they have been involved, are involved, or pose a significant risk of being or becoming involved in, activities that are contrary to the national security or foreign policy interests of the United States and those acting on behalf of such persons may be added to the Entity List pursuant to § 744.11. Paragraphs (b)(1) through (b)(5) of § 744.11 include an illustrative list of activities that could be contrary to the national security or foreign policy interests of the United States.

The thirty-six persons under forty-six entries being added have been determined by the ERC to be involved in activities that are contrary to the national security or foreign policy interests of the United States, specifically the activities described under paragraphs (b)(4) and (b)(5) of § 744.11.

The ERC has reasonable cause to believe that the following five persons, who are being added under nine entries in this rule and are located in Hong Kong, Iran, and Malaysia, reexported or caused to be reexported items subject to the EAR to Iran in violation of Department of the Treasury, Office of Foreign Assets Control regulations and the EAR: Anvik Technologies Sdn. Bhd., Montana Advanced Engineering Sdn Bhd., Albin Technologies Sdn Bhd., Hansen Technologies Limited, and Babak Jafarpour. Specifically, the above-referenced persons were involved in purchasing items subject to the EAR from U.S. companies and having the items shipped via virtual offices and freight forwarders in Hong Kong and Malaysia to Iran. The items purchased included items controlled under categories three and seven on the Commerce Control List (CCL).

The ERC also has reasonable cause to believe that the following five persons, who are being added under six entries in this rule and are located in China and Hong Kong, acted as procurement agents for Beijing University of Aeronautics and Astronautics (a.k.a. BUAA, Beihang University): Beijing Tianhua, Tenfine Ltd., Longtek Company, Ltd., FOC (HK) Technology Co., Ltd., and Comsum Technologies (Group) Ltd. BUAA has been on the Entity List since May 2001 (see 66 FR 24266). As a result of its inclusion on the Entity List, BUAA is subject to a license requirement for all items subject to the EAR and a license review policy pursuant to § 744.3 of the EAR (Restrictions on Certain Rocket Systems . . . and Unmanned Air Vehicles . . . End-Uses). The ERC determined that these entities have facilitated at least seventy-five shipments of items subject to the EAR and destined for end-use at BUAA.

The ERC also has reasonable cause to believe that the following seven persons, who are being added under nine entries in this rule and are located in Canada, Germany, Iran, Turkey, and the U.A.E., are part of a procurement ring that coordinated the sale and supply of items subject to the EAR to Iran in violation of Department of the Treasury, Office of Foreign Assets Control (OFAC) regulations and the EAR: Saeed Talebi, Satco, Satco Corporation, Satco GmbH, Kadin Satco FZE, AAG Makina, and Murat Peker. Specifically, Talebi purchased items subject to the EAR from U.S. companies and shipped them via Germany and Turkey to Iran. To facilitate his scheme, Talebi established businesses in the U.A.E., Germany, and Canada. Peker, an employee of AAG Makina in Turkey, worked with Talebi to facilitate certain of the shipments through the provision of false information to the U.S. Government on the shipments' final destination.

The ERC also has reasonable cause to believe that the following nineteen persons, which are being added under twenty-two entries in this rule and are located in Armenia, Greece, Iran, Thailand, Turkey, and the U.A.E., are part of a procurement ring that has coordinated the sale and supply of items subject to the EAR to Iran in violation of Department of the Treasury, Office of Foreign Assets Control (OFAC) regulations and the EAR: Aeolian Airlines, Seyyed Abdolreza Mousavi, Eurocenter Havacilik Dis Ticaret Limited Sirketi, Kral Aviation Services Ltd., Kral Aviaton, Asian Aviation Logistics Co., Ltd., Gulnihal Yegane, Pioneer Logistics Havacilik Turizm Yoonetim Danismanlik Ithalat Thracat San. Tic. Ltd. Sti, Thrust Aviation FZE, Aerostar Asset Management FZC, Avistar Havacilik Bilisim Turizm Insaat Sanayi Ve Ticaret Limited Sirketi, Mostafa Oveici, Vertir Airlines, Sawa Air Aviation FZCO, Avia Trust, Khalidee Boolay Surinanda, Kosol Surinanda, Ergin Turker, and Glasgow International Trading. Specifically, these persons have engaged in the development and operation of an illicit aviation procurement network designed to evade the U.S. Government's sanctions against Iran. The aggressive procurement scheme implemented by these persons has directly supported the operation of Mahan Airlines within Iran and throughout the world. Mahan Airlines has been on BIS's Denied Persons List since 2008. See 78 FR 48138 (August 7, 2008).

Pursuant to § 744.11(b)(4) and (b)(5) of the EAR, the ERC determined that the conduct of these thirty-six persons raises sufficient concern that prior review of exports, reexports, or transfers (in-country) of items subject to the EAR involving these persons, and the possible imposition of license conditions or license denials on shipments to the persons, will enhance BIS's ability to prevent violations of the EAR.

For the thirty-six persons under forty-six entries added to the Entity List, the ERC specified a license requirement for all items subject to the EAR, and established a license application review policy of a presumption of denial. The license requirement applies to any transaction in which items are to be exported, reexported, or transferred (in-country) to any of the persons or in which such persons act as purchaser, intermediate consignee, ultimate consignee, or end-user. In addition, no license exceptions are available for exports, reexports, or transfers (in-country) to the persons being added to the Entity List in this rule.

This final rule adds the following thirty-six persons under forty-six entries to the Entity List:

Armenia

(1) *Vertir Airlines,* 8/3 D Angaght Street, 376009 Yerevan, Armenia; *and* 54–100 Mamikonyan Str., Yerevan, Armenial 79, Armenia.

Canada

(1) *Saeed Talebi,* a.k.a., the following two aliases:
—Al; *and*
—Allen Talebi.
P.O. Box 626, Gormley, ONT LOH 1G0 Canada (See alternate addresses under Iran and U.A.E.); *and*

(2) *Satco Corporation,* P.O. Box 626, Gormley, ONT LOH 1G0 Canada.

China

(1) *Beijing Tianhua,* a.k.a., the following seventeen aliases:
—Beijing Tianhua International Co., Ltd.;
—Beijing BUAA Tianhua Technology Company;
—Beijing BUAA Tianhua Technology Co., Ltd.;
—Beijing Aerospace Technology Limited Liability Company;
—Beihang Tenfine Industry Group;
—Beijing Beihang Assets Management Co., Ltd.;
—Beijing Beihang Science & Technology Co., Ltd.;
—Beijing Aerospace Technology LLC;
—Beijing North China Aerospace Science & Technology Ltd., Co.;
—Beijing North Space Technology Co., Ltd.;
—Beijing the Tianhua Easytouch International Trade Co., Ltd.;
—North and Astronautics, Beijing China Times Technology Co., Ltd.;
—Beijing Beihang Haier Software Co., Ltd.;
—Red Technology;
—TRW Navigation Communication Technology Co., Ltd.;
—Beijing North Aerospace Co-Technology Co., Ltd.; *and*
—Beijing Full Three Dimensional Power Engineering Co., Ltd.
37 Xue Yuan Rd., Beijing, China; *and*
Room 301, 3f Shining Tower, 35 Xue Yuan Lu, Haidian District, Beijing, China; *and*
Room 311A, 3f Shining Tower, 35 Xue Yuan Lu, Haidian, Beijing, China; *and*
Room 411A, 4f Shining Tower, 35 Xue Yuan Lu, Haidian, Beijing, China; *and*
Room 401, 4f Shining Tower, 35 Xue Yuan Lu, Haidian District, Beijing, China; *and*
Room 402a, 4f Shining Tower, 35 Xue Yuan Lu, Haidian, Beijing, China; *and*
Xueyan Road, Haidain District, Beijing City, 35th Ning Building, Room 402a;

(2) *Comsum Technologies (Group) Ltd.,* Room 408, Unit 6, Xin Qi Dian Jia Yan, 5 Chang Qiao Road, Beijing, 100089, China (See alternate address under Hong Kong);

(3) *Longtek Company, Ltd.,* a.k.a., the following one alias:
—Beijing Landuyt Feng Technology Co., Ltd. Room 1105, TianZuo International Center A, No, 12, Zhongguncun South Street, Haidan District, Beijing 100081, China; *and*

(4) *Tenfine Ltd.,* a.k.a., the following two aliases:
—Beijing Beihang Assets Management Co. Ltd.; *and*
—Tenfine Limited Company.
No 37 Xue Yuan Lu, Haidian, Beijing, China; *and*
37 Xue Yuan Road, Beijing, China; *and* Room 401, 4f Shining Tower, 35 Xue Yuan Lu,
Haidian District, Beijing, China; *and* Room 402b, 4F Shining Tower, 35 Xue Yuan Lu,
Haidian, Beijing, China; *and* Xueyan Road, Haidain District, Beijing City, 35th Ning Building, Room 402a.

Germany

(1) *Satco GmbH,* a.k.a., the following one alias:
—Satco Inc.
Park Street 4, Bremen, Germany 28209.

Greece

(1) *Aeolian Airlines,* 551 Mesogeion Ave, Agia Paraskevi, 15343A, Athens, Greece; *and* 72 Vouliagmenis Ave, Glyfada 16675, Athens, Greece; *and* Blg Mtb 1/E 74, Athens, Greece; *and* 58 Vouliagmenis Ave, Voula 16673, Athens, Greece (See alternate addresses under Turkey); *and*

(2) *Seyyed Abdolreza Mousavi,* 551 Mesogeion Ave, Agia Paraskevi, 15343A, Athens, Greece (See alternate address under Turkey).

Hong Kong

(1) *Anvik Technologies Sdn. Bhd.,* a.k.a., the following eight aliases:
—Anvik Technologies;
—Cason Technologies;
—Henan Electronics;
—Hixton Technologies;
—Hudson Technologies, Ltd.;
—Hudson Engineering (Hong Kong) Ltd.;
—Madison Engineering Ltd.; *and*
—Montana Advanced Engineering.
Level 19, Two International Finance Centre, 8 Finance Street, Central, Hong Kong (See alternate addresses under Iran and Malaysia);

(2) *Babak Jafarpour,* a.k.a., the following five aliases:
—Bob Jefferson;
—Peter Jay;
—Sam Lee;
—Samson Lee; *and*
—David Lee.
Unit 501, 5/F, Global Gateway, 168 Yeung HK Road, Tsuen Wan, Hong Kong; *and* 9/F, Henan Building, 19 Luard Road, Wanchai, Hong Kong; *and* Level 19, Two International Finance Centre, 8 Finance Street, Central, Hong Kong (See alternate addresses under Iran and Malaysia);

(3) *Comsum Technologies (Group) Ltd.,* Room 1005, 10/F Carnarvon Plaza, 20 Carnarvon Road, TST, Kowloon, Hong Kong (See alternate address under China);

(4) *FOC (HK) Technology Co., Ltd.,* Room 8, 6/F, Shun On Commercial Building, 112–114 Des Voeux Road, Central, Hong Kong; *and*

(5) *Hansen Technologies Limited,* Unit 501, 5/F, Global Gateway, 168 Yeung HK Road, Tsuen Wan, Hong Kong; *and* 9/F, Henan Building, 19 Luard Road, Wanchai, Hong Kong.

Iran

(1) *Anvik Technologies Sdn. Bhd.,* a.k.a., the following eight aliases:
—Anvik Technologies;
—Cason Technologies;
—Henan Electronics;
—Hixton Technologies;
—Hudson Technologies, Ltd.;
—Hudson Engineering (Hong Kong) Ltd.;
—Madison Engineering Ltd.; *and*
—Montana Advanced Engineering.
F10, No. 21, 9th Alley, Vozara Ave., Tehran, Iran (See alternate addresses under Hong Kong and Malaysia);

(2) *Babak Jafarpour,* a.k.a., the following five aliases:
—Bob Jefferson;
—Peter Jay
—Sam Lee;
—Samson Lee; *and*

—David Lee.
F10, No. 21, 9th Alley, Vozara Ave., Tehran, Iran (See alternate addresses under Hong Kong and Malaysia);
(3) *Mostafa Oveici,* a.k.a., the following one alias:
—Mosi Oveici.
Mehrabad Airport, Tehran, Iran (See alternate address under Thailand);
(4) *Saeed Talebi,* a.k.a., the following two aliases:
—Al; *and*
—Allen Talebi.
No. 27, Zarif Nia, Pesyan Valley, Tehran, Iran; *and* No. 3, West Saeb Tabrizi Lane, North Sheikh Bahaee Street, Tehran, Iran (See alternate addresses under Canada and U.A.E.); *and*
(5) *Satco,* No. 3, West Saeb Tabrizi Lane, North Sheikh Bahaee Street, Tehran, Iran.

Malaysia

(1) *Albin Technologies Sdn Bhd.,* M–3–19 Plaza Damas, Sri Hartamas, Kuala Lumpur, Malaysia 50480; *and* P.O. Box 4, Level 13A, Menara Park, Block D, Megan Ave. II, No 12, Jalan Yap Kwan Seng, Kuala Lumpur, Malaysia;
(2) *Anvik Technologies Sdn. Bhd.,* a.k.a., the following eight aliases:
—Anvik Technologies;
—Cason Technologies;
—Henan Electronics;
—Hixton Technologies;
—Hudson Technologies, Ltd.;
—Hudson Engineering (Hong Kong) Ltd.;
—Madison Engineering Ltd.; *and*
—Montana Advanced Engineering.
—Level 36, Menara Citibank, 165 Jalan Ampang, Kuala Lumpur, Malaysia, 50450; *and* Level 20, Menara Standard Chartered, 30 Jalan Sultan Ismail, Kuala Lumpur, Malaysia, 50250 (See alternate addresses under Hong Kong and Iran);
(3) *Babak Jafarpour,* a.k.a., the following five aliases:
—Bob Jefferson;
—Peter Jay;
—Sam Lee;
—Samson Lee; *and*
—David Lee.
Level 36, Menara Citibank, 165 Jalan Ampang, Kuala Lumpur, Malaysia, 50450; *and* Level 20, Menara Standard Chartered, 30 Jalan Sultan Ismail, Kuala Lumpur, Malaysia, 50250; *and* Level 26, Tower 2, Etiqa Twins 11, Jalan Pinang, Kuala Lumpur, Malaysia 50450; *and* M–3–19 Plaza Damas, Sri Hartamas, Kuala Lumpur, Malaysia 50480 (See alternate addresses under Hong Kong and Iran); *and*
(4) *Montana Advanced Engineering Sdn Bhd.,* Level 26, Tower 2, Etiqa Twins 11, Jalan Pinang, Kuala Lumpur, Malaysia 50450; *and* Level 20, Menara Standard Chartered, 30 Jalan Sultan Ismail, Kuala Lumpur, Malaysia, 50250; *and* P.O. Box 4, Level 13A, Menara Park, Block D, Megan Ave. II, No 12, Jalan Yap Kwan Seng, Kuala Lumpur, Malaysia.

Thailand

(1) *Asian Aviation Logistics Co., Ltd.,* 21 Tower 2nd Floor Zone A805 Srinakarin Road, Suanluang Bangkok 10250 Thailand; *and* 111/11 Village 0.14 Kingkaew Road, Rajatheva, Bangplee District, Samutprakarn 10540, Thailand; *and* 188/5 Moo 5 Srinakarin Rd, Samrongnua, Muang, Samut Prakarn 10270, Thailand;
(2) *Khalidee Boolay Surinanda,* a.k.a., the following one alias:
—Khalidee Boolay Surinandha.
21 Tower 2nd Floor Zone A805 Srinakarin Road, Suanluang Bangkok 10250 Thailand; *and* 111/11 Village 0.14 Kingkaew Road, Rajatheva, Bangplee District, Samutprakarn 10540, Thailand *and* 111/11 Village 0.14 King Kaeo Road, Racha Thewa Sub-District, Bang Phli District, Samut Prakarn, 10540, Thailand;
(3) *Kosol Surinanda,* a.k.a., the following one alias:
—Kosol Surinandha.
140/65 ITF Tower, 27 Floor, Silom Rd., Suriyawongse, Bangrak, Bangkok, 10500, Thailand; *and* 21 Tower 2nd Floor Zone A805 Srinakarin Road, Suanluang Bangkok 10250 Thailand; *and* 495 Soi Anamai, Sri-nakarin Road, Suanluang Bangkok 10250 Thailand; *and* 111/11 Village 0.14 Kingkaew Road, Rajatheva, Bangplee District, Samutprakarn 10540, Thailand; *and* 111/11 Village 0.14 King Kaeo Road, Racha Thewa Sub-District, Bang Phli District, Samut Prakarn, 10540, Thailand; *and*
(4) *Mostafa Oveici,* a.k.a., the following one alias:
—Mosi Oveici.
21 Tower 2nd Floor Zone A805 Srinakarin Road, Suanluang Bangkok 10250 Thailand (See alternate address under Iran).

Turkey

(1) *AAG Makina,* Mah. Idris Kosku Caddesi Kutu, Sokak No:1 Pierreloti/Eyup, Istanbul, Turkey;
(2) *Aeolian Airlines,* Ozgur KK No 4 Da 5 Davran Ap Flo, Istanbul, Turkey; *and* Davran Ap Florya, Istanbul, Turkey 34153; *and* Attaturk Airport, Istanbul, Turkey (See alternate addresses under Greece);
(3) *Avistar Havacilik Bilisim Turizm Insaat Sanayi Ve Ticaret Limited Sirketi,* Yenibosna Dogu Sanayi Sitesi, 9 Blok No: 1, Bahcelievler—Istanbul, Turkey; *and* Dogu Sanayi Sitesi 9. Blok No: 9/1 Yenibosna, Istanbul, Turkey;
(4) *Ergin Turker,* Yenibosna Dogu Sanayi Sitesi, 9 Blok No: 1, Bahcelievler—Istanbul, Turkey;
(5) *Eurocenter Havacilik Dis Ticaret Limited Sirketi,* Kemalpasa Mh, Ordu Cad., Yesil Tulumba Sk No 9, Fatih, Istanbul, Turkey; *and* Yesil Tulumba Eminonu Sok No.9, Eminonu—Istanbul, Turkey 34143; *and* Yesil Tulumba Sk:No 9 Fatih, Eminonu—Istanbul, Turkey 34143; *and* Senlikkoy Mahallesi, Ozgur Sk No. 4, Da:5, Davran Ap Florya, 34153 Istanbul, Turkey;
(6) *Gulnihal Yegane,* Egs Bloklari B–1 Blok K.1 No: 114, Yesilkoy—Bakirkoy, Istanbul, Turkey; *and* Huzur mah, Ayazaga Oyak sitesi, 9.Blok, No:19, Sisli, Istanbul, Turkey; *and* Turgut Reis Mh. Glyimkent Kath Is Merk. K:4 D:4412 Esenler/Istanbul, Turkey; *and* Onucreis Mah. Giyimkent Sitesi 3. Sokak No:118 Esenler/Istanbul, Turkey;
(7) *Kral Aviation Services Ltd.,* Yesilkoy Mh.Ataturk Cd., Esg Business Park B1. B2 K:6 No:234, Bakirkoy Istanbul, Turkey;
(8) *Kral Aviation,* a.k.a., the following two aliases:
—Kral Havacilik Ic Ve Dis Ticaret Sirketi; *and*
—Kral Aviation Ltd.
Senlikkoy Mah, Gumus Sok, No: 1/3, Floor: 11, Florya 134159, Istanbul, Turkey; *and* Senlikkoy Mah. Gumus Sok. No 3/1 Floor: 1 Florya Istanbul, 34153 Turkey; *and* Yesilkoy Mh. Ataturk Cad. EGS Business Park Bloklari B2 Blok Kat:6, Istanbul, Turkey;
(9) *Murat Peker,* Mah. Idris Kosku Caddesi Kutu, Sokak No:1 Pierreloti/Eyup, Istanbul, Turkey.
(10) *Pioneer Logistics Havacilik Turizm Yonetim Danismanlik Ithalat Ihracat San. Tic. Ltd. Sti,* Egs Bloklari B–1 Blok Kat: 1 No; 114, Yesilkoy—Bakirkoy, Istanbul, Turkey *and* Huzur mah, Ayazaga Oyak sitesi, 9.Blok, No:19, Sisli, Istanbul, Turkey; *and* Turgut Reis Mh. Glyimkent Kath Is Merk. K:4 D:4412 Esenler/Istanbul, Turkey *and* Onucreis Mah. Giyimkent

Sitesi 3. Sokak No:118 Esenler/ Istanbul, Turkey; *and*

(11) *Seyyed Abdolreza Mousavi,* Kemalpasa Mh, Ordu Cad., Yesil Tulumba Sk No 9, Fatih, Istanbul, Turkey (See alternate address under Greece);

United Arab Emirates

(1) *Aerostar Asset Management FZC,* a.k.a., the following two aliases:
—Star Aviation Group; *and*
—Star Aviation Services FZC.
Sharjah Airport International Free Zone (Saif Zone), Sharjah, U.A.E.; *and* P.O. Box 9300, A2–59, Saif Zone, Sharjah, U.A.E.;

(2) *Avia Trust,* a.k.a. the following one alias:
—Avia Trust FZE.
Warehouse G–22, PO Box 54541, Dubai Airport Free Zone, Dubai, U.A.E.;

(3) *Glasgow International Trading,* a.k.a. the following one alias:
—Glasgow International General Trading LLC.
P.O. Box 6462, Dubai, U.A.E.; *and* PO Box 42064, Dubai, U.A.E.

(4) *Kadin Satco FZE,* No. 28 Street 6, Phase Springs 10, Emirates Hills, Dubai, U.A.E.;

(5) *Saeed Talebi,* a.k.a., the following two aliases:
—Al; *and*
—Allen Talebi.
No. 28 Street 6, Phase Springs 10, Emirates Hills, Dubai, U.A.E. (See alternate addresses under Canada and Iran);

(6) *Sawa Air Aviation FZCO,* a.k.a., the following two aliases:
—Sawa Aviation; *and*
—Sawa Air.
P.O. Box 42707, Al Sahel Bldg, Fish Round About, Deira, Dubai, U.A.E. 254; *and*

(7) *Thrust Aviation FZE,* 17c–F3 PO Box 5406 Fujairah Free Zone, Fujairah, U.A.E.; *and* PO Box 5232 Fujairah Free Zone, Fujairah U.A.E.; *and* Q4–168 PO 8318 Sharjah Free Zone, Sharjah, U.A.E.;

Modifications to the Entity List

On the basis of decisions made by the ERC, in addition to the thirty-six persons under forty-six entries additions described above, this rule amends three entries currently on the Entity List.

Two of the amended entries are in Canada. The first entry is amended by removing two addresses, one no longer current and the other duplicative, and the second entry is amended by updating an address, as follows:

Canada

(1) *Anastassia Voronkevitch,* 7150 Rue Chouinard, Montreal, QC H8N 2Z6 Canada; *and*

(2) *Zurab Kartvelishvili,* a.k.a., the following one alias:
—George Kartveli.
7380 Vansickle Rd. Unit 660, St. Catharines, ON L2126P7, Canada; *and* 127 Rue Wilson, Dollard-des-Ormeaux, Quebec H9A1W7, Canada.

This rule also amends one entry currently on the Entity List, which is currently listed under Sweden. This amendment changes the address for this listed person from one in Sweden to one in Estonia. The amendments provide a corrected address for this listed person, as follows:

Estonia

(1) *Andrey Shevlyakov,* Kalevipoja 12A, 13625 Tallinn, Estonia.

For the three modifications, the ERC did not change the license requirements or license application review policies. For each of the three entries subject to modifications, the license requirement remains for all items subject to the EAR, and the license application review policy remains a presumption of denial.

Removal From the Entity List

This rule implements a decision of the ERC to remove one entry consisting of one person located in Russia from the Entity List on the basis of a removal request by the listed person. Based upon a review of the information provided in the removal request in accordance with § 744.16 (Procedure for requesting removal or modification of an Entity List entity), the ERC determined that this person should be removed from the Entity List.

The ERC decision to remove this person took into account this person's cooperation with the U.S. Government, as well as this person's assurances of future compliance with the EAR. In accordance with § 744.16(c), the Deputy Assistant Secretary for Export Administration has sent written notification to this person, informing the person of the ERC's decision to remove them from the Entity List.

This final rule removes the following person located in Russia from the Entity List:

Russia

(1) *ECO–MED–SM Ltd,* Petrovsko-Razumovsky proyezd 29, bed.2, Moscow, Russia 127287.

The removal of the above referenced person from the Entity List eliminates the existing license requirements in Supplement No. 4 to part 744 for exports, reexports and transfers (in-country) to this person. However, the removal of this person from the Entity List does not relieve persons proposing to export, reexport or transfer (in-country) items subject to the EAR to the removed person of other obligations under part 744 of the EAR or under other parts of the EAR. Neither the removal of a person from the Entity List nor the removal of Entity List-based license requirements relieves persons of their obligations under General Prohibition 5 in § 736.2(b)(5) of the EAR which provides that, ''you may not, without a license, knowingly export or reexport any item subject to the EAR to an end-user or end-use that is prohibited by part 744 of the EAR.'' Additionally this removal does not relieve persons of their obligation to apply for export, reexport or in-country transfer licenses required by other provisions of the EAR. BIS strongly urges the use of Supplement No. 3 to part 732 of the EAR, ''BIS's 'Know Your Customer' Guidance and Red Flags,'' when persons are involved in transactions that are subject to the EAR.

Savings Clause

Shipments of items removed from eligibility for a License Exception or export or reexport without a license (NLR) as a result of this regulatory action that were en route aboard a carrier to a port of export or reexport, on December 12, 2013, pursuant to actual orders for export or reexport to a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export or reexport without a license (NLR).

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013) and as extended by the Notice of August 8, 2013, 78, 2013, 78 FR 49107 (August 12, 2013), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory

approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections previously approved by OMB under control number 0694–0088, Simplified Network Application Processing System, which includes, among other things, license applications and carries a burden estimate of 43.8 minutes for a manual or electronic submission. Total burden hours associated with the PRA and OMB control number 0694–0088 are not expected to increase as a result of this rule. You may send comments regarding the collection of information associated with this rule, including suggestions for reducing the burden, to Jasmeet K. Seehra, Office of Management and Budget (OMB), by email to *Jasmeet_K._Seehra@omb.eop.gov*, or by fax to (202) 395–7285.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public comment and a delay in effective date are inapplicable because this regulation involves a military or foreign affairs function of the United States. (*See* 5 U.S.C. 553(a)(1)). BIS implements this rule to protect U.S. national security or foreign policy interests by preventing items from being exported, reexported, or transferred (in country) to the persons being added to the Entity List. If this rule were delayed to allow for notice and comment and a delay in effective date, then entities being added to the Entity List by this action would continue to be able to receive items without a license and to conduct activities contrary to the national security or foreign policy interests of the United States. In addition, because these parties may receive notice of the U.S. Government's intention to place these entities on the Entity List once a proposed rule was published, it would create an incentive for these persons to either accelerate receiving items subject to the EAR to conduct activities that are contrary to the national security or foreign policy interests of the United States, and/or to take steps to set up additional aliases, change addresses, and other measures to try to limit the impact of the listing on the Entity List once a final rule was published. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

List of Subject in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 744—[AMENDED]

■ 1. The authority citation for 15 CFR part 744 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of January 17, 2013, 78 FR 4303 (January 22, 2013) Notice of August 8, 2013, 78 FR 49107 (August 12, 2013); Notice of September 18, 2013, 78 FR 58151 (September 20, 2013); Notice of November 7, 2013, 78 FR 67289 (November 12, 2013).

■ 2. Supplement No. 4 to part 744 is amended:

■ a. By adding under Armenia, in alphabetical order, one Armenian entity;

■ b. By revising under Canada, the Canadian entities: ''Anastassia Voronkevitch, 7320 St. Jacques St. W. Montreal QC, H4B1W1, Canada;'' and ''Zurab Kartvelishvili, a.k.a., the following one alias: —George Kartveli, 7380 Vansickle Rd. Unit 660, St. Catharines, ON L2126P7, Canada; and 320 St. Jacques St., W. Montreal QC, H4B1W1, Canada; and 7380 Vansickle Rd, Unit 660, St. Catharines, ON L2126P7, Canada; and 127 Rue Wilson, Dollard-des-Ormeaux, Quebec H9A1W7, Canada'';

■ c. By adding under Canada, in alphabetical order, two Canadian entities;

■ d. By adding under China, in alphabetical order, four Chinese entities;

■ e. By adding under Germany, in alphabetical order, one German entity;

■ f. By adding under Greece, in alphabetical order, two Greek entities;

■ g. By adding under Hong Kong, in alphabetical order, five Hong Kong entities;

■ h. By adding under Iran, in alphabetical order, five Iranian entities;

■ i. By adding under Malaysia, in alphabetical order, four Malaysian entities;

■ j. By adding in alphabetical order, the destination of Thailand under the Country column and four Thai entities;

■ k. By adding, in alphabetical order, the destination of Turkey under the Country column and eleven Turkish entities;

■ l. By adding under the United Arab Emirates, in alphabetical order, seven Emirati entities;

■ m. By removing under Russia, one Russian entity: ''ECO–MED–SM Ltd, Petrovsko-Razumovsky proyezd 29, bed.2, Moscow, Russia 127287;'' and

■ n. By removing under Sweden, the Swedish entity: ''Andrey Shevlyakov, Grev Turegatan 14, 11446 Stockholm, Sweden'' and then revising and adding the entry under Estonia, as the Estonian entity: ''Andrey Shevlyakov, Kalevipoja 12A, 13625 Tallinn, Estonia.''

The additions and revisions read as follows:

Supplement No. 4 to Part 744—Entity List

Country	Entity	License requirement	License review policy	**Federal Register** citation
*	*	*	*	* * *
ARMENIA	Vertir Airlines, 8/3 D Angaght Street, 376009, Yerevan, Armenia; *and* 54–100 Mamikonyan Str., Yerevan, Armenial 79, Armenia.	For all items subject to the EAR. (See § 744.11 of the EAR.).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
*	*	*	*	* * *
CANADA	*	*	* *	* *
	*	*	* *	* *
	Anastassia Voronkevitch, 7150 Rue Chouinard, Montreal, QC H8N 2Z6 Canada.	For all items subject to the EAR. (See § 744.11 of the EAR.).	Presumption of denial	77 FR 61249, 10/9/12.78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	*	*	* *	* *
	Saeed Talebi, a.k.a., the following two aliases: Al; *and* Allen Talebi. P.O. Box 626, Gormley, ONT L0H 1G0 Canada (See alternate addresses under Iran and U.A.E.).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Satco Corporation, P.O. Box 626, Gormley, ONT L0H 1G0 Canada.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	*	*	* *	* *
	Zurab Kartvelishvili, a.k.a., the following one alias: George Kartveli. 7380 Vansickle Rd. Unit 660, St. Catharines, ON L2126P7, Canada; *and* 127 Rue Wilson, Dollard-des-Ormeaux, Quebec H9A 1W7, Canada.	For all items subject to the EAR. (See § 744.11 of the EAR.).	Presumption of denial	77 FR 61249, 10/9/12. 78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
CHINA, PEOPLE'S REPUBLIC OF	*	*	* *	* *

Country	Entity	License requirement	License review policy	**Federal Register** citation
	Beijing Tianhua, a.k.a., the following seventeen aliases: Beijing Tianhua International Co., Ltd.; Beijing BUAA Tianhua Technology Company; Beijing BUAA Tianhua Technology Co., Ltd.; Beijing Aerospace Technology Limited Liability Company; Beihang Tenfine Industry Group; Beijing Beihang Assets Management Co., Ltd.; Beijing Beihang Science & Technology Co., Ltd.; Beijing Aerospace Technology LLC; Beijing North China Aerospace Science & Technology Ltd., Co.; Beijing North Space Technology Co., Ltd.; Beijing the Tianhua Easytouch International Trade Co., Ltd.; North and Astronautics, Beijing China Times Technology Co., Ltd.; Beijing Beihang Haier Software Co., Ltd.; Red Technology; TRW Navigation Communication Technology Co., Ltd.; Beijing North Aerospace Co-Technology Co., Ltd.; *and* Beijing Full Three Dimensional Power Engineering Co., Ltd. 37 Xue Yuan Rd., Beijing, China; *and* Room 301, 3f Shining Tower, 35 Xue Yuan Lu, Haidian District, Beijing, China; *and* Room 311A, 3f Shining Tower, 35 Xue Yuan Lu, Haidian, Beijing, China; *and* Room 411A, 4f Shining Tower, 35 Xue Yuan Lu, Haidian, Beijing, China; *and* Room 401, 4f Shining Tower, 35 Xue Yuan Lu, Haidian District, Beijing, China; *and* Room 402a, 4f Shining Tower, 35 Xue Yuan Lu, Haidian, Beijing, China; *and* Xueyan Road, Haidain District, Beijing City, 35th Ning Building, Room 402a.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	*	*	*	*
	Comsum Technologies (Group) Ltd., Room 408, Unit 6, Xin Qi Dian Jia Yan, 5 Chang Qiao Road, Beijing, 100089, China (See alternate address under Hong Kong).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	*	*	*	*
	Longtek Company, Ltd., a.k.a., the following one alias: Beijing Landuyt Feng Technology Co., Ltd. Room 1105, TianZuo International Center A, No, 12, Zhongguncun South Street, Haidan District, Beijing 100081, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	*	*	*	*

Country	Entity	License requirement	License review policy	**Federal Register** citation
	Tenfine Ltd., a.k.a., the following two aliases: Beijing Beihang Assets Management Co. Ltd.; *and* Tenfine Limited Company. No 37 Xue Yuan Lu, Haidian, Beijing, China; *and* 37 Xue Yuan Road, Beijing, China; *and* Room 401, 4f Shining Tower, 35 Xue Yuan Lu, Haidian District, Beijing, China; *and* Room 402b, 4F Shining Tower, 35 Xue Yuan Lu, Haidian, Beijing, China; *and* Xueyan Road, Haidain District, Beijing City, 35th Ning Building, Room 402a.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	* * *	*	* *	*
*	* *	*	* *	*
ESTONIA	Andrey Shevlyakov, Kalevipoja 12A, 13625 Tallinn, Estonia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	77 FR 61249, 10/9/12. 78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	*	* *	*	*
*	* *	*	* *	*
GERMANY	*	* *	*	*
	Satco GmbH, a.k.a., the following one alias: Satco Inc. Park Street 4, Bremen, Germany 28209.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	*	* *	*	*
GREECE	Aeolian Airlines, 551 Mesogeion Ave, Agia Paraskevi, 15343A, Athens, Greece; *and*72 Vouliagmenis Ave, Glyfada 16675, Athens, Greece; *and*Blg Mtb 1/E 74, Athens, Greece; *and* 58 Vouliagmenis Ave, Voula 16673, Athens, Greece;(See alternate addresses under Turkey).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER AND 12/12/2013.
	*	* *	*	*
	Seyyed Abdolreza Mousavi, 551 Mesogeion Ave, Agia Paraskevi, 15343A, Athens, Greece; (See alternate address under Turkey).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	*	* *	*	*
HONG KONG	*	* *	*	*
	Anvik Technologies Sdn. Bhd., a.k.a., the following eight aliases: Anvik Technologies; Cason Technologies; Henan Electronics; Hixton Technologies; Hudson Technologies, Ltd.; Hudson Engineering (Hong Kong) Ltd.; Madison Engineering Ltd.;*and* Montana Advanced Engineering. Level 19, Two International Finance Centre, 8 Finance Street, Central, Hong Kong (See alternate addresses under Iran and Malaysia).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.

Country	Entity	License requirement	License review policy	Federal Register citation
	Babak Jafarpour, a.k.a., the following five aliases: Bob Jefferson;-Peter Jay; Sam Lee; Samson Lee; *and* David Lee. Unit 501, 5/F, Global Gateway, 168 Yeung HK Road, Tsuen Wan, Hong Kong; *and* 9/F, Henan Building, 19 Luard Road, Wanchai, Hong Kong; *and* Level 19, Two International Finance Centre, 8 Finance Street, Central, Hong Kong (See alternate addresses under Iran and Malaysia).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	* * * * *			
	Comsum Technologies (Group) Ltd., Room 1005, 10/F Carnarvon Plaza, 20 Carnarvon Road, TST, Kowloon, Hong Kong (See alternate address under China).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	* * * * *			
	FOC (HK) Technology Co., Ltd., Room 8, 6/F, Shun On Commercial Building, 112–114 Des Voeux Road, Central, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	* * * * *			
	Hansen Technologies Limited, Unit 501, 5/F, Global Gateway, 168 Yeung HK Road, Tsuen Wan, Hong Kong; *and* 9/F, Henan Building, 19 Luard Road, Wanchai, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	* * * * *			
* * * * * * *				
IRAN	* * * * *			
	Anvik Technologies Sdn. Bhd., a.k.a., the following eight aliases: Anvik Technologies; Cason Technologies; Henan Electronics; Hixton Technologies; Hudson Technologies, Ltd.; Hudson Engineering (Hong Kong) Ltd.; Madison Engineering Ltd.; *and* Montana Advanced Engineering. F10, No. 21, 9th Alley, Vozara Ave., Tehran, Iran (See alternate addresses under Hong Kong and Malaysia)..	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER] 12/12/2013.
	* * * * *			
	Babak Jafarpour, a.k.a., the following five aliases: Bob Jefferson; Peter Jay; Sam Lee; Samson Lee; *and* David Lee. F10, No. 21, 9th Alley, Vozara Ave., Tehran, Iran (See alternate addresses under Hong Kong and Malaysia).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	* * * * *			
	Mostafa Oveici, a.k.a., the following one alias: Mosi Oveici. Mehrabad Airport, Tehran, Iran, (See alternate address under Thailand).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
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Country	Entity	License requirement	License review policy	**Federal Register** citation
	Saeed Talebi, a.k.a., the following two aliases: Al; *and* Allen Talebi. No. 27, Zarif Nia, Pesyan Valley, Tehran, Iran; *and* No. 3, West Saeb Tabrizi Lane, North Sheikh Bahaee Street, Tehran, Iran (See alternate addresses under Canada and U.A.E.).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
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	Satco, No. 3, West Saeb Tabrizi Lane, North Sheikh Bahaee Street, Tehran, Iran.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
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MALAYSIA	* * * * *			
	Albin Technologies Sdn Bhd., M–3–19 Plaza Damas, Sri Hartamas, Kuala Lumpur, Malaysia 50480; *and* P.O. Box 4, Level 13A, Menara Park, Block D, Megan Ave. II, No 12, Jalan Yap Kwan Seng, Kuala Lumpur, Malaysia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
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	Anvik Technologies Sdn. Bhd., a.k.a., the following eight aliases: Anvik Technologies; Cason Technologies, Henan Electronics; Hixton Technologies; Hudson Technologies, Ltd.; Hudson Engineering (Hong Kong) Ltd.; Madison Engineering Ltd.; *and* Montana Advanced Engineering. Level 36, Menara Citibank, 165 Jalan Ampang, Kuala Lumpur, Malaysia, 50450; *and* Level 20, Menara Standard Chartered, 30 Jalan Sultan Ismail, Kuala Lumpur, Malaysia, 50250, (See alternate addresses under Hong Kong and Iran).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	* * * * *			
	Babak Jafarpour, a.k.a., the following five aliases: Bob Jefferson; Peter Jay; Sam Lee; Samson Lee; *and* David Lee. Level 36, Menara Citibank, 165 Jalan Ampang, Kuala Lumpur, Malaysia, 50450; *and* Level 20, Menara Standard Chartered, 30 Jalan Sultan Ismail, Kuala Lumpur, Malaysia, 50250; *and* Level 26, Tower 2, Etiqa Twins 11, Jalan Pinang, Kuala Lumpur, Malaysia 50450; *and* M–3–19 Plaza Damas, Sri Hartamas, Kuala Lumpur, Malaysia 50480 (See alternate addresses under Hong Kong and Iran).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
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Country	Entity	License requirement	License review policy	**Federal Register** citation
	Montana Advanced Engineering Sdn Bhd., Level 26, Tower 2, Etiqa Twins 11, Jalan Pinang, Kuala Lumpur, Malaysia 50450; *and* Level 20, Menara Standard Chartered, 30 Jalan Sultan Ismail, Kuala Lumpur, Malaysia, 50250; *and* P.O. Box 4, Level 13A, Menara Park, Block D, Megan Ave. II, No 12, Jalan Yap Kwan Seng, Kuala Lumpur, Malaysia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
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THAILAND	Asian Aviation Logistics Co., Ltd., 21 Tower 2nd Floor Zone A805 Srinakarin Road, Suanluang Bangkok 10250 Thailand; *and* 111/11 Village 0.14 Kingkaew Road, Rajatheva, Bangplee District, Samutprakarn 10540, Thailand; *and* 188/5 Moo 5 Srinakarin Rd, Samrongnua, Muang, Samut Prakarn 10270, Thailand.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Khalidee Boolay Surinanda, a.k.a., the following one alias: Khalidee Boolay Surinandha. 21 Tower 2nd Floor Zone A805 Srinakarin Road, Suanluang Bangkok 10250 Thailand; *and* 111/11 Village 0.14 Kingkaew Road, Rajatheva, Bangplee District, Samutprakarn 10540, Thailand; *and* 111/11 Village 0.14 King Kaeo Road, Racha Thewa Sub-District, Bang Phli District, Samut Prakarn, 10540, Thailand.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Kosol Surinanda, a.k.a., the following one alias: Kosol Surinandha.140/65 ITF Tower, 27 Floor, Silom Rd., Suriyawongse, Bangrak, Bangkok, 10500, Thailand; *and* 21 Tower 2nd Floor Zone A805 Srinakarin Road, Suanluang Bangkok 10250 Thailand; *and*495 Soi Anamai, Srinakarin Road, Suanluang Bangkok 10250 Thailand;*and* 111/11 Village 0.14 Kingkaew Road, Rajatheva, Bangplee District, Samutprakarn 10540, Thailand; *and* 111/11 Village 0.14 King Kaeo Road, Racha Thewa Sub-District, Bang Phli District, Samut Prakarn, 10540, Thailand.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Mostafa Oveici, a.k.a., the following one alias: Mosi Oveici. 21 Tower 2nd Floor Zone A805 Srinakarin Road, Suanluang Bangkok 10250 Thailand, (See alternate address under Iran).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
TURKEY	AAG Makina, Mah. Idris Kosku Caddesi Kutu, Sokak No: 1 Pierreloti/Eyup, Istanbul, Turkey.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Aeolian Airlines, Ozgur KK No 4 Da 5 Davran Ap Flo, Istanbul, Turkey; *and* Davran Ap Florya, Istanbul, Turkey 34153; *and* Attaturk Airport, Istanbul, Turkey, (See alternate addresses under Greece).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.

Country	Entity	License requirement	License review policy	**Federal Register** citation
	Avistar Havacilik Bilisim Turizm Insaat Sanayi Ve Ticaret Limited Sirketi, Yenibosna Dogu Sanayi Sitesi, 9 Blok No: 1, Bahcelievler—Istanbul, Turkey; *and* Dogu Sanayi Sitesi 9. Blok No:9/1 Yenibosna, Istanbul, Turkey.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Ergin Turker, Yenibosna Dogu Sanayi Sitesi, 9 Blok No: 1, Bahcelievler—Istanbul, Turkey.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Eurocenter Havacilik Dis Ticaret Limited Sirketi, Kemalpasa Mh, Ordu Cad., Yesil Tulumba Sk No 9, Fatih, Istanbul, Turkey; *and* Yesil Tulumba Eminonu Sok No. 9, Eminonu—Istanbul, Turkey 34143; *and* Yesil Tulumba Sk: No 9 Fatih, Eminonu Istanbul, Turkey 34143; *and* Senlikkoy Mahallesi, Ozgur Sk No. 4, Da: 5, Davran Ap Florya, 34153 Istanbul, Turkey.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Gulnihal Yegane, Egs Bloklari B–1 Blok K.1 No: 114, Yesilkoy Bakirkoy, Istanbul, Turkey; *and* Huzur mah, Ayazaga Oyak sitesi, 9. Blok, No: 19, Sisli, Istanbul, Turkey; *and* Turgut Reis Mh. Glyimkent Kath Is Merk. K:4 D:4412 Esenler/Istanbul, Turkey; *and* Onucreis Mah. Giyimkent Sitesi 3. Sokak No:118 Esenler/Istanbul, Turkey.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Kral Aviation Services Ltd., Yesilkoy Mh.Ataturk Cd., Esg Business Park B1. B2 K:6 No:234, Bakirkoy Istanbul, Turkey.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Kral Aviation, a.k.a., the following two aliases: Kral Havacilik Ic Ve Dis Ticaret Sirketi; *and* Kral Aviation Ltd. Senlikkoy Mah, Gumus Sok, No: 1/3, Floor: 11, Florya 134159, Istanbul, Turkey; *and* Senlikkoy Mah. Gumus Sok. No 3/1 Floor: 1 Florya Istanbul, 34153 Turkey *and* Yesilkoy Mh. Ataturk Cad. EGS Business Park Bloklari B2 Blok Kat:6, Istanbul Turkey.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Murat Peker, Mah. Idris Kosku Caddesi Kutu, Sokak No: 1 Pierreloti/Eyup, Instanbul, Turkey.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Pioneer Logistics Havacilik Turizm Yonetim Danismanlik Ithalat Ihracat San. Tic. Ltd. Sti, Egs Bloklari B–1 Blok Kat: 1 No; 114, Yesilkoy Bakirkoy, Istanbul, Turkey *and* Huzur mah, Ayazaga Oyak sitesi, 9. Blok, No:19, Sisli, Istanbul, Turkey; *and* Turgut Reis Mh. Glyimkent Kath Is Merk. K:4 D:4412 Esenler/Istanbul, Turkey *and* Onucreis Mah. Giyimkent Sitesi 3. Sokak No:118 Esenler/Istanbul, Turkey.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Seyyed Abdolreza Mousavi, Kemalpasa Mh, Ordu Cad., Yesil Tulumba Sk No 9, Fatih, Istanbul, Turkey, (See alternate address under Greece).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
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UNITED ARAB EMIRATES	* * * * *			

Country	Entity	License requirement	License review policy	**Federal Register** citation
	Aerostar Asset Management FZC, a.k.a., the following two aliases: Star Aviation Group; *and* Star Aviation Services FZC. Sharjah Airport International Free Zone (Saif Zone), Sharjah, United Arab Emirates; *and* P.O. Box 9300, A2–59, Saif Zone, Sharjah, U.A.E.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
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	Avia Trust, a.k.a., the following one alias: Avia Trust FZE. Warehouse G–22 PO Box 54541, Dubai Airport Free Zone Dubai, U.A.E.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	* * * * *			
	Glasgow International Trading, a.k.a., the following one alias: Glasgow International General Trading LLC. P.O. Box 6462, Dubai, U.A.E.; *and* P.O. Box 42064, Dubai U.A.E.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	* * * * *			
	Kadin Satco FZE, No. 28 Street 6, Phase Springs 10, Emirates Hills, Dubai, U.A.E.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	* * * * *			
	Saeed Talebi, a.k.a., the following two aliases: Al; *and* Allen Talebi. No. 28 Street 6, Phase Springs 10, Emirates Hills, Dubai, U.A.E., (See alternate addresses under Canada and Iran).	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
	Sawa Air Aviation FZCO, a.k.a., the following two aliases: Sawa Aviation; *and* Sawa Air. P.O. Box 42707, Al Sahel Bldg, Fish Round About, Deira, Dubai, U.A.E. 254.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
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	Thrust Aviation FZE, 17c–F3 PO Box 5406 Fujairah Free Zone, Fujairah U.A.E.; *and* PO Box 5232 Fujairah Free Zone, Fujairah U.A.E.; *and* Q4–168 PO 8318 Sharjah Free Zone, Sharjah, U.A.E.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	78 FR [INSERT FR PAGE NUMBER], 12/12/2013.
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Dated: November 21, 2013.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2013–28663 Filed 12–11–13; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 31

[TD 9649]

RIN 1545–BI21

Section 3504 Agent Employment Tax Liability

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to agents authorized by the Secretary under section 3504 of the Internal Revenue Code to perform acts required of employers who are home care service recipients. The final regulations affect employers and their designated agents who pay wages for home care services, which are subject to taxes under the Federal Unemployment Tax Act. The final regulations also modify the existing regulations under section 3504 to be consistent with the organizational structure of the Internal Revenue Service (IRS), and to update the citation to the Internal Revenue Code of 1986.

DATES: *Effective Date:* These regulations are effective on December 12, 2013.

Applicability Date: For dates of applicability, see § 31.3504–1(c) of these regulations.

FOR FURTHER INFORMATION CONTACT: Michelle R. Weigelt at (202) 622–0047 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 31 under section 3504 of the Internal Revenue Code (Code). On January 13, 2010, the Treasury Department and the IRS published a notice of proposed rulemaking (REG–137036–08, 75 FR 1735, 2010–6 I.R.B. 398) (the proposed regulations) in the **Federal Register** under section 3504 of the Code. The Treasury Department and the IRS did not hold a public hearing because there were no requests to speak at a hearing. The Treasury Department and the IRS received written and electronic comments responding to the proposed regulations. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision. The comments and revisions are discussed in the preamble.

Explanation of Provisions

In case a fiduciary, agent, or other person has the control, receipt, custody, or disposal of, or pays the wages of an employee or group of employees, employed by one or more employers, section 3504 of the Code authorizes the Secretary of the Treasury to promulgate regulations to authorize the person (''agent'') to perform certain specified acts required of employers. Under section 3504, all provisions of law (including penalties) applicable with respect to employers are applicable to the agent and remain applicable to the employer. Accordingly, both the agent and employer are liable for the employment taxes and penalties associated with the employer's employment tax obligations which the agent is authorized to perform. Prior to the amendments made by these final regulations, § 31.3504–1 of the Employment Tax Regulations provided that the IRS may authorize an agent to undertake the employment tax obligations of an employer with respect to income tax withholding and Federal Insurance Contributions Act (FICA) taxes. However, the employer was required to continue to meet its employment tax obligations with respect to Federal Unemployment Tax Act (FUTA) tax. Like the proposed regulations, these final regulations provide that the IRS may authorize an agent to undertake the employment tax obligations of an employer with respect to FUTA tax in certain circumstances.

Summary of Comments and Explanation of Revisions

A. Amendments to § 31.3504–1(a)

Under § 31.3504–1(a), an employer may request that the IRS authorize an agent under section 3504 to report, file, and pay income tax withholding, tax under the FICA, or tax under the Railroad Retirement Tax Act (RRTA), with respect to wages or compensation. The proposed regulations under § 31.3504–1(a) proposed amendments to the existing regulatory language designed to update citations and be consistent with the current organizational structure of the IRS.

One commenter expressed concern that deletion of the limiting language ''in respect of such acts'' from these regulations implied an agent could be held liable for all of an employer's employment tax liabilities, regardless of which acts the agent was authorized to perform. Under section 3504, the agent is only liable for acts the IRS has authorized the agent to perform on behalf of the employer. Thus, language that limits the scope of the agent's liability has been reincorporated into the final regulations.

Another commenter suggested that the final regulations include a rule that the agent is only liable for employment taxes with respect to wages or compensation paid by the agent on behalf of the employer. Because section 3504 provides an agent may also be authorized under section 3504 if the person has the control, receipt, custody, or disposal of the wages of an employer's employees, a rule that the agent can only be held liable for employment taxes with respect to those wages paid by the agent would be more narrow than the statute. Therefore, this rule was not adopted in the final regulations.

In addition to the change to proposed § 31.3504–1(a) made in response to comments, these final regulations adopt minor changes for clarity and consistency.

B. Amendments Under § 31.3504–1(b)

The proposed regulations under § 31.3504–1(b) provide a special rule that allows an employer who is a home care service recipient to request that the IRS authorize an agent to act with respect to FUTA taxes imposed on wages paid for home care services, provided that the agent is authorized to act for the home care service recipient for income tax withholding and FICA tax purposes. The proposed regulations under § 31.3504–1(b) do not apply to an agent that is authorized to report, file, and pay income tax withholding or FICA tax for an employer who is not a home care service recipient, or for wages paid for services other than home care services.

Several commenters sought legal or procedural explanations which were beyond the scope of the proposed regulations. Thus, those comments are not addressed in these final regulations. For example, these regulations do not address comments seeking clarification on the identity of the common law employer if the home care service recipient has a representative acting on his or her behalf, the ability of an agent to delegate its responsibility to a third-party, the application of certain exceptions to FICA and FUTA taxes, the proper use of employer identification numbers (EIN) in filing employment tax returns, and the deposit requirements of agents. However, Revenue Procedure 2013–39, which is being released simultaneously with these final regulations updates the procedures for requesting that the IRS authorize a person to act as agent under section 3504, and addresses filing, reporting, and deposit rules for agents.

1. Certification of State Unemployment Contributions

Section 3504 provides that all provisions of law applicable to an employer apply to the agent. Thus, an agent authorized under the proposed regulations for FUTA tax purposes reports the state unemployment contributions paid into a state unemployment fund on behalf of a home care service recipient as a credit under section 3302 against the FUTA tax reported on the agent's aggregate FUTA tax return. The IRS has designated Form 940, Employer's Annual Federal Unemployment Tax (FUTA) Return, as the return to file to report FUTA tax. The credit can be reported by the agent regardless of whether the state unemployment contributions are made under the name and state identifying number of the home care service recipient or of the agent.

Several commenters expressed concern that the IRS will be unable to verify the state unemployment contributions made on behalf of a home care service recipient if such contributions are reported on an aggregate Form 940 FUTA tax return using the agent's name and EIN. The commenters suggested that each home care service recipient's name and EIN be included on the aggregate return for purposes of the annual certification process.

Following the publication of the proposed regulations, the IRS issued Schedule R (Form 940), Allocation Schedule for Aggregate Form 940 Filers, for use beginning in tax year 2010. Agents of home care service recipients are required to use Schedule R (Form 940) to allocate the information reported on the aggregate FUTA tax return, and must separately list each home care service recipient's name and EIN on Schedule R (Form 940). Because the issuance of Schedule R (Form 940) resolves the concerns raised by these commenters, no changes were made to the final regulations.

2. Domestic Service Employment Tax Rules and Home Care Services

The proposed regulations define *home care services* to include health care and personal attendant care services rendered in the home care service recipient's home or local community. Several commenters requested clarification of whether home care services constitute domestic services for employment tax purposes, particularly when the services involve travel outside the home.

The Code has special rules for domestic services. These special rules include provisions in section 3401(a)(3) regarding the requirement to withhold income tax; sections 3121(a)(7)(B), 3306(a)(3), and 3306(c)(2) regarding minimum dollar thresholds for imposition of FICA and FUTA taxes; section 3121(b)(3)(B) regarding exemption from FICA tax for certain family employment relationships; and section 3121(b)(21) regarding exemption from FICA tax depending on the age of the service provider. Whether any of these rules apply in a given situation depends on whether the services are ''domestic services'' and whether the services are provided in the ''private home'' of the employer. These terms are explained in §§ 31.3121(a)(7)–1(a)(2), 31.3306(c)(2)–1, and 31.3401(a)–3 of the regulations.

Generally, § 31.3121(a)(7)–1(a)(2) provides that domestic services are services of a household nature performed by an employee in or about a private home of the person by whom the employee is employed. A private home is a fixed place of abode of an individual or family. Sections 31.3306(c)(2)–1 and 31.3401(a)–3 contain similar descriptions for FUTA tax and income tax withholding purposes, respectively.

The preamble to the proposed regulations stated that services provided outside the home care service recipient's private home may qualify as home care services for purposes of these regulations even if the services do not qualify as domestic service in a private home of the employer for purposes of sections 3121(a)(7), 3306(c)(2), and 3401(a)(3).

One commenter requested a rule deeming the special statutory rules for domestic services as applying to all home care services. The determination of whether the statutory rules for domestic services apply depends on whether the services are domestic services provided in the private home of the employer as explained in the regulations. Thus, a bright line rule that home care services are domestic services in all cases is beyond the scope of these regulations, and the proposal was not adopted.

However, we anticipate that there will only be limited circumstances when home care services would not be subject to the domestic service rules and note that the regulations on domestic service described in this section, and other public guidance currently available address these comments. For example, Revenue Ruling 56–109, 1956–1 CB 467, provides that services performed by an employee as a companion to a convalescent employer, including accompanying the convalescent on trips, constitute domestic service in a private home of the employer for purposes of employment taxes.

Several commenters interpreted the use of the phrase ''home or local community'' in the definition of home care services to impose geographical restrictions. The phrase was intended to indicate that despite the home-based nature of health care and personal attendant care services, home care services may be provided outside of a home, and was not intended to exclude services qualifying for funds under the government program based on the location at which the services were provided. Thus, home care services under the regulations include any services for which an individual enrolled in a government program described in the regulations would be eligible to receive funds. Similar to how Rev. Rul. 56–109 describes a situation where services that are provided outside the employer's house nevertheless constitute ''domestic services *in the private home* of the employer,'' services provided outside the home or local community may constitute home care services. Nevertheless, to avoid the implication of a geographical limitation on what services may qualify as home care services, the phrase was removed from the definition of home care services in the final regulations.

Finally, one commenter interpreted the definition of home care services to include only services provided to elderly individuals and individuals with physical disabilities, and not to include services provided to individuals with intellectual and developmental disabilities. The definition of home care services in the proposed regulations are not limited by the type of disability. Rather, the definition of home care services includes any services for which an individual enrolled in a government program described in the regulations would be eligible to receive funds. Therefore, no changes were made to the final regulations with regard to the definition of home care services to address this comment.

3. Clarification Regarding Home Care Service Recipients

The proposed regulations define *home care service recipient* as any individual who receives home care services while enrolled, and for the remainder of the calendar year after ceasing to be enrolled, in a program administered by a Federal, state, or local government agency that provides Federal, state, or local government funds, to pay, in whole or in part, for the home care services for that individual. Several commenters submitted questions regarding this definition that did not require changes to the regulations, but with respect to which clarification is provided in this preamble.

With regard to the Federal, state, or local government programs which provide funds for home care services, the preamble to the proposed regulations provides, ''In all such programs, intermediaries who are engaged to assist beneficiaries to receive and distribute funds on the beneficiaries' behalf are reviewed and approved by a state or local government agency.'' Several commenters interpreted this statement as inferring coordination between the IRS and the Centers for Medicare and Medicaid Services (CMS) regarding qualifications and contracting requirements for agents. The statement was intended to highlight the currently existing oversight of the intermediaries that serve as agents in these programs by CMS or other Federal, state, and local government agencies. There is no anticipated IRS involvement in the way these agencies administer these programs, including selection and monitoring of the intermediaries.

Application of the proposed regulations requires that a home care service recipient be enrolled in a program that provides Federal, state, or local government funds to pay for home care services, *in whole or in part.* One commenter asked whether an individual who pays for home care services from his or her personal bank account or with other non-government funds can be a home care service recipient within the meaning of the regulations. An individual is not a home care service recipient within the meaning of these regulations if no government funds are used to pay for any part of the home care services performed for the individual. However, an individual may be a home care service recipient if the cost of the home care services are initially paid for with non-government funds and such cost is reimbursed in whole or in part with government funds provided under the government program.

Other commenters asked about procedures an agent should follow when an individual ceases to be a home care service recipient. Under § 31.3504–1(b)(3), a participant qualifies as a home care service recipient until the end of the calendar year in which the participant ceases to be enrolled in the government program; accordingly, the agent may act as an agent with respect to the home care service recipient's FUTA tax obligations for the entire calendar year in which the participant ceases to qualify as a home care service recipient. Furthermore, the agent may continue to act as an agent with respect to the home care service recipient's FICA tax and income tax withholding obligations pursuant to § 31.3504–1(a) after a participant ceases to qualify as a home care service recipient. Treasury and the IRS do not believe a description of any specific procedures is needed in these regulations with regard to the cessation of home care service recipient status for FUTA tax purposes. However, Revenue Procedure 2013–39, which is being released simultaneously with these final regulations updates the procedures to request the IRS authorize a person to act as agent under section 3504 and clarifies the rules for revoking authorization.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in E.O. 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. The collection of information contained in these regulations is a voluntary written application from an employer, signed by the employer and the agent, requesting the IRS approve the appointment of an agent to perform the acts required of the employer. The application contains information generally available to taxpayers, such as the name, address, and EIN of the employer, and ultimately serves to lessen taxpayer burden by allowing the employer to have an agent fulfill certain employment tax obligations. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

The principal author of these final regulations is Michelle R. Weigelt, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, personnel from other offices of the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Reporting and recordkeeping requirements, Railroad retirement, Social security, Unemployment compensation.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 31 is amended as follows:

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

■ **Paragraph 1.** The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 31.3504–1 is revised to read as follows:

§ 31.3504–1 Designation of agent by application.

(a) *In general.* In the event wages as defined in chapter 21 or 24 of the Internal Revenue Code (Code), or compensation as defined in chapter 22 of the Code, of an employee or group of employees, employed by one or more employers, is paid by a fiduciary, agent, or other person (''agent''), or if that agent has the control, receipt, custody, or disposal of (collectively ''pays'') wages or compensation, the Internal Revenue Service may, subject to the terms and conditions as it deems proper, authorize that agent to perform the acts required of the employer or employers under those provisions of the Code and the regulations that apply, for purposes of the taxes imposed by the chapter or chapters, with respect to wages or compensation paid by the agent. If the agent is authorized by the Internal Revenue Service to perform such acts, all provisions of law (including penalties) and of the regulations applicable to an employer with respect to such acts shall be applicable to the agent. However, each employer for whom the agent acts shall remain subject to all provisions of law (including penalties) and of the regulations applicable to an employer with respect to such acts. Any application to authorize an agent to perform such acts, signed by the agent and the employer, shall be made on the form prescribed by the Internal Revenue Service and shall be filed with the Internal Revenue Service as prescribed in the instructions to the form and other applicable guidance.

(b) *Special rule for home care service recipients.* (1) *In general.* In the event an agent is authorized pursuant to paragraph (a) of this section to perform the acts required of an employer under chapters 21 or 24 on behalf of one or more home care service recipients, as defined in paragraph (b)(3) of this section, the Internal Revenue Service may authorize that agent to perform the acts as are required of employers for purposes of the tax imposed by chapter 23 of the Code with respect to wages paid by the agent for home care services, as defined in paragraph (b)(2) of this section, rendered to the home care service recipient. If the agent is authorized by the Internal Revenue Service to perform such acts, all provisions of law (including penalties) and of the regulations applicable to an employer in respect of such acts shall be applicable to the agent. However, each employer for whom the agent acts shall remain subject to all provisions of law (including penalties) and of the regulations applicable to an employer with respect to such acts.

(2) *Home care services.* For purposes of this section, the term *home care services* includes health care and personal attendant care services rendered to the home care service recipient.

(3) *Home care service recipient.* For purposes of this section, the term *home*

care service recipient means any individual who receives home care services, as defined in paragraph (b)(2) of this section, while enrolled, and for the remainder of the calendar year after ceasing to be enrolled, in a program administered by a Federal, state, or local government agency that provides Federal, state, or local government funds, to pay, in whole or in part, for home care services for that individual.

(c) *Effective/applicability dates.* An authorization under paragraph (a) in effect prior to December 12, 2013 continues to be in effect after that date. Paragraph (b) of this section applies to wages paid on or after January 1, 2014. However, pursuant to section 7805(b), taxpayers may rely on paragraph (b) of this section for all taxable years for which a valid designation is in effect under paragraph (a) of this section.

Beth Tucker,

Deputy Commissioner for Services and Enforcement.

Approved: September 27, 2013.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2013–29664 Filed 12–11–13; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2008–0574; EPA–HQ–SFUND–2012–0069; EPA–HQ–SFUND–2013–0196, 0197, 0198, 0201, 0202, 0203, 0204 and 0207; FRL–9903–89–OSWER]

National Priorities List, Final Rule No. 57

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (''CERCLA'' or ''the Act''), as amended, requires that the National Oil and Hazardous Substances Pollution Contingency Plan (''NCP'') include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants or contaminants throughout the United States. The National Priorities List (''NPL'') constitutes this list. The NPL is intended primarily to guide the Environmental Protection Agency (''the EPA'' or ''the agency'') in determining which sites warrant further investigation. These further investigations will allow the EPA to assess the nature and extent of public health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. This rule adds nine sites to the General Superfund section of the NPL and changes the name of one NPL site.

DATES: The effective date for this amendment to the NCP is January 13, 2014.

ADDRESSES: Contact information for the EPA Headquarters:

• Docket Coordinator, Headquarters; U.S. Environmental Protection Agency; CERCLA Docket Office; 1301 Constitution Avenue NW; William Jefferson Clinton Building West, Room 3334, Washington, DC 20004, 202–566–0276.

The contact information for the Regional Dockets is as follows:

• Holly Inglis, Region 1 (CT, ME, MA, NH, RI, VT), U.S. EPA, Superfund Records and Information Center, 5 Post Office Square, Suite 100, Boston, MA 02109–3912; 617–918–1413.

• Ildefonso Acosta, Region 2 (NJ, NY, PR, VI), U.S. EPA, 290 Broadway, New York, NY 10007–1866; 212–637–4344.

• Lorie Baker (ASRC), Region 3 (DE, DC, MD, PA, VA, WV), U.S. EPA, Library, 1650 Arch Street, Mailcode 3HS12, Philadelphia, PA 19103; 215–814–3355.

• Jennifer Wendel, Region 4 (AL, FL, GA, KY, MS, NC, SC, TN), U.S. EPA, 61 Forsyth Street SW., Mailcode 9T25, Atlanta, GA 30303; 404–562–8799.

• Todd Quesada, Region 5 (IL, IN, MI, MN, OH, WI), U.S. EPA Superfund Division Librarian/SFD Records Manager SRC–7J, Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, IL 60604; 312–886–4465.

• Brenda Cook, Region 6 (AR, LA, NM, OK, TX), U.S. EPA, 1445 Ross Avenue, Suite 1200, Mailcode 6SFTS, Dallas, TX 75202–2733; 214–665–7436.

• Michelle Quick, Region 7 (IA, KS, MO, NE), U.S. EPA, 11201 Renner Blvd., Mailcode SUPRERNB, Lenexa, KS 66219; 913–551–7335.

• Sabrina Forrest, Region 8 (CO, MT, ND, SD, UT, WY), U.S. EPA, 1595 Wynkoop Street, Mailcode 8EPR–B, Denver, CO 80202–1129; 303–312–6484.

• Sharon Murray, Region 9 (AZ, CA, HI, NV, AS, GU, MP), U.S. EPA, 75 Hawthorne Street, Mailcode SFD 6–1, San Francisco, CA 94105; 415–947–4250.

• Ken Marcy, Region 10 (AK, ID, OR, WA), U.S. EPA, 1200 6th Avenue, Mailcode ECL–112, Seattle, WA 98101; 206–463–1349.

FOR FURTHER INFORMATION CONTACT: Terry Jeng, phone: (703) 603–8852, email: *jeng.terry@epa.gov*, Site Assessment and Remedy Decisions Branch, Assessment and Remediation Division, Office of Superfund Remediation and Technology Innovation (Mailcode 5204P), U.S. Environmental Protection Agency; 1200 Pennsylvania Avenue NW., Washington, DC 20460; or the Superfund Hotline, phone (800) 424–9346 or (703) 412–9810 in the Washington, DC, metropolitan area.

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I. Background

A. What are CERCLA and SARA?

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601–9675 (''CERCLA'' or ''the Act''), in response to the dangers of uncontrolled releases or threatened releases of hazardous substances, and releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. CERCLA was amended on October 17, 1986, by the Superfund Amendments and Reauthorization Act (''SARA''), Public Law 99–499, 100 Stat. 1613 *et seq.*

B. What is the NCP?

To implement CERCLA, the EPA promulgated the revised National Oil and Hazardous Substances Pollution Contingency Plan (''NCP''), 40 CFR Part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP sets guidelines and procedures for responding to releases and threatened releases of hazardous substances, or releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. The EPA has revised the NCP on several occasions. The most recent comprehensive revision was on March 8, 1990 (55 FR 8666).

As required under section 105(a)(8)(A) of CERCLA, the NCP also includes ''criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable, taking into account the potential urgency of such action, for the purpose of taking removal action.'' ''Removal'' actions are defined broadly and include a wide range of actions taken to study, clean up, prevent or otherwise address releases and threatened releases of hazardous substances, pollutants or contaminants (42 U.S.C. 9601(23)).

C. What is the National Priorities List (NPL)?

The NPL is a list of national priorities among the known or threatened releases of hazardous substances, pollutants or contaminants throughout the United States. The list, which is appendix B of the NCP (40 CFR Part 300), was required under section 105(a)(8)(B) of CERCLA, as amended. Section 105(a)(8)(B) defines the NPL as a list of ''releases'' and the highest priority ''facilities'' and requires that the NPL be revised at least annually. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances, pollutants or contaminants. The NPL is of only limited significance, however, as it does not assign liability to any party or to the owner of any specific property. Also, placing a site on the NPL does not mean that any remedial or removal action necessarily need be taken.

For purposes of listing, the NPL includes two sections, one of sites that are generally evaluated and cleaned up by the EPA (the ''General Superfund Section'') and one of sites that are owned or operated by other federal agencies (the ''Federal Facilities Section''). With respect to sites in the Federal Facilities Section, these sites are generally being addressed by other federal agencies. Under Executive Order 12580 (52 FR 2923, January 29, 1987) and CERCLA section 120, each federal agency is responsible for carrying out most response actions at facilities under its own jurisdiction, custody or control, although the EPA is responsible for preparing a Hazard Ranking System (''HRS'') score and determining whether the facility is placed on the NPL.

D. How are sites listed on the NPL?

There are three mechanisms for placing sites on the NPL for possible remedial action (see 40 CFR 300.425(c) of the NCP): (1) A site may be included on the NPL if it scores sufficiently high on the HRS, which the EPA promulgated as appendix A of the NCP (40 CFR Part 300). The HRS serves as a screening tool to evaluate the relative potential of uncontrolled hazardous substances, pollutants or contaminants to pose a threat to human health or the environment. On December 14, 1990 (55 FR 51532), the EPA promulgated revisions to the HRS partly in response to CERCLA section 105(c), added by SARA. The revised HRS evaluates four pathways: Ground water, surface water, soil exposure and air. As a matter of agency policy, those sites that score 28.50 or greater on the HRS are eligible for the NPL. (2) Pursuant to 42 U.S.C. 9605(a)(8)(B), each state may designate a single site as its top priority to be listed on the NPL, without any HRS score. This provision of CERCLA requires that, to the extent practicable, the NPL include one facility designated by each state as the greatest danger to public health, welfare or the environment among known facilities in the state. This mechanism for listing is set out in the NCP at 40 CFR 300.425(c)(2). (3) The third mechanism for listing, included in the NCP at 40 CFR 300.425(c)(3), allows certain sites to be listed without any HRS score, if all of the following conditions are met:

- The Agency for Toxic Substances and Disease Registry (ATSDR) of the U.S. Public Health Service has issued a health advisory that recommends dissociation of individuals from the release.
- The EPA determines that the release poses a significant threat to public health.
- The EPA anticipates that it will be more cost-effective to use its remedial authority than to use its removal authority to respond to the release.

The EPA promulgated an original NPL of 406 sites on September 8, 1983 (48 FR 40658) and generally has updated it at least annually.

E. What happens to sites on the NPL?

A site may undergo remedial action financed by the Trust Fund established under CERCLA (commonly referred to as the ''Superfund'') only after it is placed on the NPL, as provided in the NCP at 40 CFR 300.425(b)(1). (''Remedial actions'' are those ''consistent with a permanent remedy, taken instead of or in addition to removal actions. . . .'' 42 U.S.C.

9601(24).) However, under 40 CFR 300.425(b)(2), placing a site on the NPL ''does not imply that monies will be expended.'' The EPA may pursue other appropriate authorities to respond to the releases, including enforcement action under CERCLA and other laws.

F. Does the NPL define the boundaries of sites?

The NPL does not describe releases in precise geographical terms; it would be neither feasible nor consistent with the limited purpose of the NPL (to identify releases that are priorities for further evaluation), for it to do so. Indeed, the precise nature and extent of the site are typically not known at the time of listing.

Although a CERCLA ''facility'' is broadly defined to include any area where a hazardous substance has ''come to be located'' (CERCLA section 101(9)), the listing process itself is not intended to define or reflect the boundaries of such facilities or releases. Of course, HRS data (if the HRS is used to list a site) upon which the NPL placement was based will, to some extent, describe the release(s) at issue. That is, the NPL site would include all releases evaluated as part of that HRS analysis.

When a site is listed, the approach generally used to describe the relevant release(s) is to delineate a geographical area (usually the area within an installation or plant boundaries) and identify the site by reference to that area. However, the NPL site is not necessarily coextensive with the boundaries of the installation or plant, and the boundaries of the installation or plant are not necessarily the ''boundaries'' of the site. Rather, the site consists of all contaminated areas within the area used to identify the site, as well as any other location where that contamination has come to be located, or from where that contamination came.

In other words, while geographic terms are often used to designate the site (e.g., the ''Jones Co. plant site'') in terms of the property owned by a particular party, the site, properly understood, is not limited to that property (e.g., it may extend beyond the property due to contaminant migration), and conversely may not occupy the full extent of the property (e.g., where there are uncontaminated parts of the identified property, they may not be, strictly speaking, part of the ''site''). The ''site'' is thus neither equal to, nor confined by, the boundaries of any specific property that may give the site its name, and the name itself should not be read to imply that this site is coextensive with the entire area within the property boundary of the installation or plant. In addition, the site name is merely used to help identify the geographic location of the contamination, and is not meant to constitute any determination of liability at a site. For example, the name ''Jones Co. plant site,'' does not imply that the Jones company is responsible for the contamination located on the plant site.

EPA regulations provide that the Remedial Investigation (''RI'') ''is a process undertaken . . . to determine the nature and extent of the problem presented by the release'' as more information is developed on site contamination, and which is generally performed in an interactive fashion with the Feasibility Study (''FS'') (40 CFR 300.5). During the RI/FS process, the release may be found to be larger or smaller than was originally thought, as more is learned about the source(s) and the migration of the contamination. However, the HRS inquiry focuses on an evaluation of the threat posed and therefore the boundaries of the release need not be exactly defined. Moreover, it generally is impossible to discover the full extent of where the contamination ''has come to be located'' before all necessary studies and remedial work are completed at a site. Indeed, the known boundaries of the contamination can be expected to change over time. Thus, in most cases, it may be impossible to describe the boundaries of a release with absolute certainty.

Further, as noted above, NPL listing does not assign liability to any party or to the owner of any specific property. Thus, if a party does not believe it is liable for releases on discrete parcels of property, it can submit supporting information to the agency at any time after it receives notice it is a potentially responsible party.

For these reasons, the NPL need not be amended as further research reveals more information about the location of the contamination or release.

G. How are sites removed from the NPL?

The EPA may delete sites from the NPL where no further response is appropriate under Superfund, as explained in the NCP at 40 CFR 300.425(e). This section also provides that the EPA shall consult with states on proposed deletions and shall consider whether any of the following criteria have been met:

(i) Responsible parties or other persons have implemented all appropriate response actions required;

(ii) All appropriate Superfund-financed response has been implemented and no further response action is required; or

(iii) The remedial investigation has shown the release poses no significant threat to public health or the environment, and taking of remedial measures is not appropriate.

H. May the EPA delete portions of sites from the NPL as they are cleaned up?

In November 1995, the EPA initiated a policy to delete portions of NPL sites where cleanup is complete (60 FR 55465, November 1, 1995). Total site cleanup may take many years, while portions of the site may have been cleaned up and made available for productive use.

I. What is the Construction Completion List (CCL)?

The EPA also has developed an NPL construction completion list (''CCL'') to simplify its system of categorizing sites and to better communicate the successful completion of cleanup activities (58 FR 12142, March 2, 1993). Inclusion of a site on the CCL has no legal significance.

Sites qualify for the CCL when: (1) Any necessary physical construction is complete, whether or not final cleanup levels or other requirements have been achieved; (2) the EPA has determined that the response action should be limited to measures that do not involve construction (e.g., institutional controls); or (3) the site qualifies for deletion from the NPL. For the most up-to-date information on the CCL, see the EPA's Internet site at *http://www.epa.gov/superfund/cleanup/ccl.htm*

J. What is the sitewide ready for anticipated use measure?

The Sitewide Ready for Anticipated Use measure represents important Superfund accomplishments and the measure reflects the high priority the EPA places on considering anticipated future land use as part of the remedy selection process. See Guidance for Implementing the Sitewide Ready-for-Reuse Measure, May 24, 2006, OSWER 9365.0–36. This measure applies to final and deleted sites where construction is complete, all cleanup goals have been achieved, and all institutional or other controls are in place. The EPA has been successful on many occasions in carrying out remedial actions that ensure protectiveness of human health and the environment for current and future land uses, in a manner that allows contaminated properties to be restored to environmental and economic vitality. For further information, please go to *http://www.epa.gov/superfund/programs/recycle/pdf/sitewide_a.pdf*

K. What is state/tribal correspondence concerning NPL listing?

In order to maintain close coordination with states and tribes in the NPL listing decision process, the EPA's policy is to determine the position of the states and tribes regarding sites that the EPA is considering for listing. This consultation process is outlined in two memoranda that can be found at the following Web site: *http://www.epa.gov/superfund/sites/npl/hrsres/policy/govlet.pdf* The EPA is improving the transparency of the process by which state and tribal input is solicited. The EPA will be using the Web and where appropriate more structured state and tribal correspondence that (1) explains the concerns at the site and the EPA's rationale for proceeding; (2) requests an explanation of how the state intends to address the site if placement on the NPL is not favored; and (3) emphasizes the transparent nature of the process by informing states that information on their responses will be publicly available.

A model letter and correspondence from this point forward between the EPA and states and tribes where applicable, is available on the EPA's Web site at *http://www.epa.gov/superfund/sites/query/queryhtm/nplstcor.htm*

II. Availability of Information to the Public

A. May I review the documents relevant to this final rule?

Yes, documents relating to the evaluation and scoring of the sites in this final rule are contained in dockets located both at the EPA Headquarters and in the Regional offices.

An electronic version of the public docket is available through *www.regulations.gov* (see table below for Docket Identification numbers). Although not all Docket materials may be available electronically, you may still access any of the publicly available Docket materials through the Docket facilities identified below in section II D.

DOCKET IDENTIFICATION NUMBERS BY SITE

Site name	City/county, state	Docket ID No.
Rockets, Fireworks, and Flares (RFF) (formerly known as B.F. Goodrich).	Rialto, CA	EPA–HQ–SFUND–2008–0574.
Beck's Lake	South Bend, IN	EPA–HQ–SFUND–2013–0196.
Garden City Ground Water Plume	Garden City, IN	EPA–HQ–SFUND–2013–0197.
Keystone Corridor Ground Water Contamination	Indianapolis, IN	EPA–HQ–SFUND–2013–0198.
Cristex Drum	Oxford, NC	EPA–HQ–SFUND–2013–0201.
Hemphill Road TCE	Gastonia, NC	EPA–HQ–SFUND–2013–0202.
Collins & Aikman Plant (Former)	Farmington, NH	EPA–HQ–SFUND–2013–0203.
Jackpile-Paguate Uranium Mine	Laguna Pueblo, NM	EPA–HQ–SFUND–2012–0069.
Wilcox Oil Company	Creek County, OK	EPA–HQ–SFUND–2013–0204.
Makah Reservation Warmhouse Beach Dump	Neah Bay, WA	EPA–HQ–SFUND–2013–0207.

B. What documents are available for review at the headquarters docket?

The Headquarters Docket for this rule contains, for each site, the HRS score sheets, the Documentation Record describing the information used to compute the score, pertinent information regarding statutory requirements or the EPA listing policies that affect the site and a list of documents referenced in the Documentation Record. For sites that received comments during the comment period, the Headquarters Docket also contains a Support Document that includes the EPA's responses to comments.

C. What documents are available for review at the regional dockets?

The Regional Dockets contain all the information in the Headquarters Docket, plus the actual reference documents containing the data principally relied upon by the EPA in calculating or evaluating the HRS score for the sites located in their Region. These reference documents are available only in the Regional Dockets. For sites that received comments during the comment period, the Regional Docket also contains a Support Document that includes the EPA's responses to comments.

D. How do I access the documents?

You may view the documents, by appointment only, after the publication of this rule. The hours of operation for the Headquarters Docket are from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding federal holidays. Please contact the Regional Dockets for hours. For addresses for the Headquarters and Regional Dockets, see **ADDRESSES** section in the beginning portion of this preamble.

E. How may I obtain a current list of NPL sites?

You may obtain a current list of NPL sites via the Internet at *http://www.epa.gov/superfund/sites/npl/index.htm* or by contacting the Superfund Docket (see contact information in the beginning portion of this notice).

III. Contents of This Final Rule

A. Additions to the NPL

This final rule adds the following nine sites to the General Superfund Section of the NPL. All of the sites included in this final rulemaking are being added to the NPL based on HRS scores of 28.50 or above. The sites are presented in the table below:

General Superfund section:

State	Site name	City/county
IN	Beck's Lake	South Bend.
IN	Garden City Ground Water Plume	Garden City.
IN	Keystone Corridor Ground Water Contamination	Indianapolis.
NC	Cristex Drum	Oxford.
NC	Hemphill Road TCE	Gastonia.
NH	Collins & Aikman Plant (Former)	Farmington.

State	Site name	City/county
NM	Jackpile-Paguate Uranium Mine	Laguna Pueblo.
OK	Wilcox Oil Company	Creek County.
WA	Makah Reservation Warmhouse Beach Dump	Neah Bay.

B. What did the EPA do with the public comments it received?

The EPA reviewed all comments received on the sites in this rule and responded to all relevant comments. This rule adds nine sites to the NPL, all to the General Superfund Section.

Comments on two of the sites, Beck's Lake (South Bend, IN) and Jackpile-Paguate Uranium Mine (Laguna Pueblo, NM) are being addressed in response to comment support documents available in the public docket concurrently with this rule. Two generic comments, applicable to the Jackpile-Paguate Uranium Mine and all other sites proposed in March 2012, have been previously addressed in the September 2012 NPL final rule preamble (77 FR 57495, September 18, 2012).

None of the other seven sites being added to the NPL in this rule, which were proposed May 24, 2013 (78 FR 31464), received comments relating to the HRS score. Five sites received no comments and are, therefore, being added to the NPL. They are Collins & Aikman Plant (Former) (Farmington, NH), Cristex Drum (Oxford, NC), Hemphill Road TCE (Gastonia, NC), Keystone Corridor Ground Water Contamination (Indianapolis, IN) and Wilcox Oil Company (Creek County, OK). Although one comment was submitted to the Hemphill Road TCE docket, it was directed at the Smurfit-Stone Mill site, and will be addressed at the time a final decision is made on that site.

The Makah Reservation Warmhouse Beach Dump (Neah Bay, WA) received one comment which supported placing the site on the NPL. In response, the Makah Reservation Warmhouse Beach Dump has been added to the NPL. Listing makes a site eligible for remedial action funding under CERCLA. The site will be further investigated during the remedial investigation/feasibility study (RI/FS) phase of the Superfund process to determine what response, if any, is appropriate to ensure protection of public health and the environment.

The Garden City Ground Water Plume (Garden City, IN) received one comment. The comment stated that tribal governments should be required to allow access to all records to any American taxpayer who requested it. The comment must have been directed to the wrong docket, since the Garden City Ground Water Plume has no tribal involvement. If the comment was directed to the Makah Reservation Warmhouse Beach Dump, as opposed to some other regulatory docket, EPA's response is that this issue is unrelated to listing and thus has no bearing on EPA's decision to list the site.

C. Site Name Change

The EPA is changing the name of the B.F. Goodrich site in Rialto, California to Rockets, Fireworks, and Flares (RFF). This site was added to the NPL on September 23, 2009 (74 FR 48412). This name change was proposed on May 24, 2013 (78 FR 31464) (docket number EPA–HQ–SFUND–2008–0574). In response to a request by a Settling Work Party to change the site name, EPA had proposed changing the name to Locust Ave. The City of Rialto submitted comments in opposition to the new proposed name. The comments stated that the proposed name would stigmatize the local community and confuse the general public about the nature of the contamination. The comments included a unanimous resolution passed by the City Council and signed by the Mayor reflecting the community's unequivocal disapproval of the new proposed site name.

In response, the new site name has been revised to Rockets, Fireworks, and Flares (RFF). Since the primary purpose of an NPL listing is to inform the public that the EPA has determined that the site warrants further investigation, the EPA attempts to select the name that clearly informs the public but, when possible, does not offend local sensitivities. With the limited purpose of the NPL, as stated in *RSR Corp.* v. *EPA,* 102 F.3d 1266 (D.C. Cir. 1997), when naming a site, EPA may choose a name that reflects ''the location or nature of the problems at a site and that are readily and easily associated with the site by the general public.'' The new name informs the public of activities that are believed to have contributed to contamination at the site.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

1. What is Executive Order 12866?

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the agency must determine whether a regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities or the principles set forth in the Executive Order.

2. Is this final rule subject to Executive Order 12866 review?

No. The listing of sites on the NPL does not impose any obligations on any entities. The listing does not set standards or a regulatory regime and imposes no liability or costs. Any liability under CERCLA exists irrespective of whether a site is listed. It has been determined that this action is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

1. What is the Paperwork Reduction Act?

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information that requires OMB approval under the PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations, after initial display in the preamble of the final rules, are listed in 40 CFR Part 9.

2. Does the Paperwork Reduction Act apply to this final rule?

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* the EPA has determined that the PRA does not apply because this rule does not contain any information collection requirements that require approval of the OMB.

Burden means the total time, effort or financial resources expended by persons to generate, maintain, retain or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install and utilize technology and systems for the purposes of collecting, validating and verifying information, processing and maintaining information and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR Part 9.

C. Regulatory Flexibility Act

1. What is the Regulatory Flexibility Act?

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations and small governmental jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

2. How has the EPA complied with the Regulatory Flexibility Act?

This rule listing sites on the NPL does not impose any obligations on any group, including small entities. This rule also does not establish standards or requirements that any small entity must meet, and imposes no direct costs on any small entity. Whether an entity, small or otherwise, is liable for response costs for a release of hazardous substances depends on whether that entity is liable under CERCLA 107(a). Any such liability exists regardless of whether the site is listed on the NPL through this rulemaking. Thus, this rule does not impose any requirements on any small entities. For the foregoing reasons, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

1. What is the Unfunded Mandates Reform Act (UMRA)?

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local and tribal governments and the private sector. Under section 202 of the UMRA, the EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''federal mandates'' that may result in expenditures by state, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Before the EPA promulgates a rule where a written statement is needed, section 205 of the UMRA generally requires the EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows the EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before the EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of the EPA regulatory proposals with significant federal intergovernmental mandates and informing, educating and advising small governments on compliance with the regulatory requirements.

2. Does UMRA apply to this final rule?

This final rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local and tribal governments, in the aggregate, or the private sector in any one year. Listing a site on the NPL does not itself impose any costs. Listing does not mean that the EPA necessarily will undertake remedial action. Nor does listing require any action by a private party or determine liability for response costs. Costs that arise out of site responses result from site-specific decisions regarding what actions to take, not directly from the act of placing a site on the NPL. Thus, this rule is not subject to the requirements of section 202 and 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As is mentioned above, site listing does not impose any costs and would not require any action of a small government.

E. Executive Order 13132: Federalism

1. What is Executive Order 13132?

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires the EPA to develop an accountable process to ensure ''meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

2. Does Executive Order 13132 apply to this final rule?

This final rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it does not contain any requirements applicable to states or other levels of government.

Thus, the requirements of the Executive Order do not apply to this final rule.

The EPA believes, however, that this final rule may be of significant interest to state governments. In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA therefore consulted with state officials and/or representatives of state governments early in the process of developing the rule to permit them to have meaningful and timely input into its development. All sites included in this final rule were referred to the EPA by states for listing. For all sites in this rule, the EPA received letters of support either from the governor or a state official who was delegated the authority by the governor to speak on their behalf regarding NPL listing decisions.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

1. What is Executive Order 13175?

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires the EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the federal government and the Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.''

2. Does Executive Order 13175 apply to this final rule?

This final rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Listing a site on the NPL does not impose any costs on a tribe or require a tribe to take remedial action. Thus, Executive Order 13175 does not apply to this final rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

1. What is Executive Order 13045?

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that the EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency.

2. Does Executive Order 13045 apply to this final rule?

This rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because the agency does not have reason to believe the environmental health or safety risks addressed by this section present a disproportionate risk to children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

1. What is Executive Order 13211?

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use'' (66 FR 28355, May 22, 2001), requires federal agencies to prepare a ''Statement of Energy Effects'' when undertaking certain regulatory actions. A Statement of Energy Effects describes the adverse effects of a ''significant energy action'' on energy supply, distribution, and use, reasonable alternatives to the action and the expected effects of the alternatives on energy supply, distribution, and use.

2. Does Executive Order 13211 apply to this final rule?

This action is not a ''significant energy action'' as defined in Executive Order 13211, because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. Further, the agency has concluded that this final rule is not likely to have any adverse energy impacts because adding a site to the NPL does not require an entity to conduct any action that would require energy use, let alone that which would significantly affect energy supply, distribution or usage. Thus, Executive Order 13211 does not apply to this action.

I. National Technology Transfer and Advancement Act

1. What is the National Technology Transfer and Advancement Act?

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

2. Does the National Technology Transfer and Advancement Act apply to this final rule?

No. This rulemaking does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

1. What is Executive Order 12898?

Executive Order (EO) 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

2. Does Executive Order 12898 apply to this final rule?

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. As this rule does not impose any enforceable duty upon state, tribal or local governments, this rule will neither increase nor decrease environmental protection.

K. Congressional Review Act

1. Has the EPA submitted this rule to Congress and the Government Accountability Office?

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement

Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA has submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A ''major rule'' cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

2. Could the effective date of this final rule change?

Provisions of the Congressional Review Act (CRA) or section 305 of CERCLA may alter the effective date of this regulation.

The EPA has submitted a report under the CRA for this rule. The rule will take effect, as provided by law, within 30 days of publication of this document, since it is not a major rule. NPL listing is not a major rule because, by itself, imposes no monetary costs on any person. It establishes no enforceable duties, does not establish that the EPA necessarily will undertake remedial action, nor does it require any action by any party or determine liability for site response costs. Costs that arise out of site responses result from site-by-site decisions about what actions to take, not directly from the act of listing itself. Section 801(a)(3) provides for a delay in the effective date of major rules after this report is submitted.

3. What could cause a change in the effective date of this rule?

Under 5 U.S.C. 801(b)(1), a rule shall not take effect, or continue in effect, if Congress enacts (and the President signs) a joint resolution of disapproval, described under section 802.

Another statutory provision that may affect this rule is CERCLA section 305, which provides for a legislative veto of regulations promulgated under CERCLA. Although *INS* v. *Chadha,* 462 U.S. 919,103 S. Ct. 2764 (1983), and *Bd. of Regents of the University of Washington* v. *EPA,* 86 F.3d 1214,1222 (D.C. Cir. 1996), cast the validity of the legislative veto into question, the EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives.

If action by Congress under either the CRA or CERCLA section 305 calls the effective date of this regulation into question, the EPA will publish a document of clarification in the **Federal Register**.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: November 27, 2013.

Mathy Stanislaus,

Assistant Administrator, Office of Solid Waste and Emergency Response.

40 CFR Part 300 is amended as follows:

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 1. The authority citation for Part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

■ 2. Table 1 of Appendix B to part 300 is amended by:

■ a. Revising the site name entry located in Rialto, California that currently reads'' B.F. Goodrich'' to read ''Rockets, Fireworks, and Flares (RFF).''; and

■ b. Adding entries for ''Beck's Lake, Garden City Ground Water Plume, Keystone Corridor Ground Water Contamination, Cristex Drum, Hemphill Road TCE, Collins & Aikman Plant (Former), Jackpile-Paguate Uranium Mine, Wilcox Oil Company, and Makah Reservation Warmhouse Beach Dump'' in alphabetical order by state;

The revisions and additions read as follows:

Appendix B to Part 300—National Priorities List

TABLE 1—GENERAL SUPERFUND SECTION

State	Site name	City/county	Notes [(a)]
*	* * * *	*	*
CA	Rockets, Fireworks, and Flares (RFF)	Rialto	
*	* * * *	*	*
IN	Beck's Lake	South Bend	
*	* * * *	*	*
IN	Garden City Ground Water Plume	Garden City	
*	* * * *	*	*
IN	Keystone Corridor Ground Water Contamination	Indianapolis	
*	* * * *	*	*
NC	Cristex Drum	Oxford	
*	* * * *	*	*
NC	Hemphill Road TCE	Gastonia	
*	* * * *	*	*
NH	Collins & Aikman Plant (Former)	Farmington	
*	* * * *	*	*
NM	Jackpile-Paguate Uranium Mine	Laguna Pueblo	
*	* * * *	*	*
OK	Wilcox Oil Company	Creek County	

TABLE 1—GENERAL SUPERFUND SECTION—Continued

State	Site name	City/county	Notes [(a)]
* * *	* * *	*	*
WA	Makah Reservation Warmhouse Beach Dump	Neah Bay	
* * *	* * *	*	*

[(a)] = Based on issuance of health advisory by Agency for Toxic Substances and Disease Registry (if scored, HRS score need not be greater than or equal to 28.50).
S = State top priority (included among the 100 top priority sites regardless of score).
P = Sites with partial deletion(s).

* * * * *

[FR Doc. 2013–29350 Filed 12–11–13; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Part 302–7

[FTR Amendment 2013–03; FTR Case 2013–301; Docket No. 2013–0011, Sequence No. 1]

RIN 3090–AJ40

Federal Travel Regulation (FTR); Relocation Allowances; Commuted Rate

AGENCY: Office of Governmentwide Policy (OGP), U.S. General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: The GSA, OGP, is providing a workable commuted rate to be used by agencies in determining a benchmark for payment on the transportation of household goods and temporary storage under a ''do it yourself'' move cost scenario. This final rule will meet the requirements set forth in the U.S. Code for Relocation Expenses.

DATES: *Effective:* This final rule is effective December 12, 2013.

FOR FURTHER INFORMATION CONTACT: Contact the U.S. General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., 2nd Floor Washington, DC 20405–0001, 202–501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ed Davis, Office of Governmentwide Policy (MA), at 202–208–7639 or email at *ed.davis@gsa.gov.* Please cite FTR Amendment 2013–03, FTR case 2013–301.

SUPPLEMENTARY INFORMATION:

A. Background

5 U.S.C. 5724(c) requires that GSA maintain a commuted rate incorporating all aspects of household goods shipping that is based on a per 100 pound rate fixed by zones. The GSA OGP is issuing a new commuted rate chart to meet the requirements of this law.

The U.S. Department of Transportation's Surface Transportation Board (STB) ruled that the American Moving and Storage Association (AMSA) could no longer provide a standard tariff for HouseHold Goods (HHG) shipments. The effective date for this ruling was January 1, 2008. Prior to January 1, 2008, the AMSA 415–G tariff was treated by Federal agencies as the commuted rate; that is, when a Federal employee moved his/her own household goods or hired his/her own mover, the AMSA tariff was used by the agency as a benchmark, to help determine whether the agency should reimburse the full amount the employee vouchered for. Agencies are still required to do this in accordance with the regulations at Federal Management Regulation (FMR) section 102–117.225 and Federal Travel Regulation (FTR) section 302–7, subpart B. Both of these regulations were made obsolete by the STB ruling.

Since both the FMR and FTR address the commuted rate, GSA is concurrently publishing an FMR Bulletin and an FTR Bulletin on this issue.

B. Changes to the Current FTR

This final rule—

- Revises section 302–7.101 to direct the reader to the GSA Web site to calculate commuted rate shipments.
- Revises section 302–7.102 to direct the reader to use the tariffs filed with GSA travel management centers.
- Adds new section 302–7.110 to direct the reader to the GSA Web site to calculate commuted rate shipments.

C. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

This final rule is not required to be published in the **Federal Register** for notice and comment as per the exemption specified in 5 U.S.C. 553(a)(2); therefore, the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* does not apply. However, this final rule is being published to provide transparency in the promulgation of Federal policies.

E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the Federal Travel Regulation do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

F. Small Business Regulatory Enforcement Fairness Act

This final rule is also exempt from congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Part 302–7

Government employees, Transportation and storage of property, Travel and transportation expenses.

Dated: November 25, 2013.

Dan Tangherlini,

Administrator of General Services.

For the reasons set forth in the preamble, under 5 U.S.C. 5738, 5 U.S.C. 5724(c) and 20 U.S.C. 905(a), GSA is amending 41 CFR part 302–7 as follows:

PART 302–7—TRANSPORTATION AND TEMPORARY STORAGE OF HOUSEHOLD GOODS, PROFESSIONAL BOOKS, PAPERS, AND EQUIPMENT, (PBP&E) AND BAGGAGE ALLOWANCE

■ 1. The authority citation for 41 CFR part 302–7 continues to read as follows:

Authority: 5 U.S.C. 5738; 20 U.S.C. 905(a); E.O. 11609, as amended, 3 CFR, 1971–1973 Comp., p. 586.

■ 2. Revise the part heading to read as set forth above.

§ 302–7.100 [Amended]

■ 3. Amend § 302–7.100 in the fourth sentence, by removing the words ''Household Goods Carriers' Mileage Guide (issued by the Household Goods Carriers' Bureau, 1611 Duke Street, Alexandria, VA 22314–3482)''.

■ 4. Revise § 302–7.101 to read as follows:

§ 302–7.101 Where can the commuted rate schedules for the transportation of HHG and temporary storage be found?

The commuted rate table is published at *www.gsa.gov/relocationpolicy.*

§ 302–7.102 [Amended]

■ 5. Amend § 302–7.102 by removing ''the Household Goods Carriers' Standard Mileage Guide, or a standard road atlas issued by The Household Goods Carrier's Bureau,'' and adding ''you may use the tariffs filed with GSA travel management centers'' in its place.

■ 6. Revise § 302–7.110 to read as follows:

§ 302–7.110 Is there a reimbursement limit?

Yes, reimbursement must not exceed the limits in the commuted rate table published by GSA and found at *www.gsa.gov/relocationpolicy.*

[FR Doc. 2013–29209 Filed 12–11–13; 8:45 am]

BILLING CODE 6820–14–P

GENERAL SERVICES ADMINISTRATION

41 CFR Part 102–117

[FMR Change 2013–02; FMR Case 2013–102–2; Docket No. 2013–0013; Sequence No. 1]

RIN 3090–AJ38

Federal Management Regulation (FMR); Shipping Household Goods

AGENCY: Office of Governmentwide Policy (OGP), U.S. General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: GSA is amending the Federal Management Regulation (FMR) to update information on the commuted rate schedule and correct a Web site address. Commuted rate and actual expense are two authorized methods of transporting and paying for the movement of Household Goods (HHG), Professional Books, Paper and Equipment, and temporary storage. This final rule addresses changes only to the commuted rate method. Using the commuted rate method, the individual assumes responsibility for shipment and payment. The commuted rate schedule establishes the reimbursement rate.

DATES: *Effective Date:* December 12, 2013.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Lee Gregory, Office of Governmentwide Policy, at 202–501–1533 or by email at *lee.gregory@gsa.gov.* Please cite FMR Case 2013–102–2. For information pertaining to status or publication schedules, contact the Regulatory Secretariat (MVCB), 1800 F Street NW., Washington, DC 20405, 202–501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

A commuted rate in household goods shipping means the reimbursement rate the Federal employee receives for moving his/her own HHG or hiring his/her own mover within the Continental United States excluding Alaska and Hawaii.

The U.S. Department of Transportation's Surface Transportation Board (STB), in decision STB Ex Parte 656, effective January 1, 2008, terminated approval of all outstanding motor carrier bureau agreements under 49 U.S.C. 13703(c) and the agreements with the National Classification Committee (NCC). Therefore, effective January 1, 2008, the American Moving and Storage Association (AMSA) could no longer provide a standard tariff for HHG shipments. Until the STB ruling, executive agencies used the AMSA standard tariff for HHG shipments for commuted rate purposes. This standard tariff was used by agencies as the benchmark to help determine whether the agency should reimburse the full amount of the employee's voucher.

Agencies currently use the commuted rate based on the AMSA tariff in accordance with the regulations in the Federal Management Regulation (FMR) part 102–117, subpart G (41 CFR 102–117.220 through 102–117.245) and FTR part 302–7, subpart B (41 CFR part 302–7, subpart B). Since both the FMR and FTR address the commuted rate, GSA is concurrently publishing bulletins and amendments for the FMR and the FTR on this issue.

B. Changes to the Current FMR

This final rule amends FMR section 102–117.225 by:

1. Eliminating the reference to the AMSA; and
2. Updating the Web site address for the current GSA commuted rate schedule.

C. Executive Order 12866 and Executive Order 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action, and therefore, will not be subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This final rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

These revisions are minor, and this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* This final rule is also exempt from the Administrative Procedure Act per 5 U.S.C. 553(a)(2) because it applies to agency management or personnel.

E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the Federal Management Regulation do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

F. Small Business Regulatory Enforcement Fairness Act

This final rule is also exempt from congressional review prescribed under 5 U.S.C. 801 since it relates to agency management or personnel.

List of Subjects in 41 CFR Part 102–117

Cargo, Commuted rate, Freight, Household goods, Transportation, Travel.

Dated: June 7, 2013.

Dan Tangherlini,

Acting Administrator of General Services.

For the reasons set forth in the preamble, GSA amends 41 CFR part 102–117 as set forth below:

PART 102–117—TRANSPORTATION MANAGEMENT

■ 1. The authority citation for part 102–117 is revised to read as follows:

Authority: 31 U.S.C. 3726; 40 U.S.C. 121(c); 40 U.S.C. 501, *et seq.;* 46 U.S.C. 55305; 49 U.S.C. 40118.

■ 2. Amend § 102–117.225 by—

■ a. Removing the last sentence in paragraph (b);

■ b. Revising paragraph (c); and

■ c. Removing paragraph (d).

The revised text reads as follows:

§ 102–117.225 What is the difference between a contract or a rate tender and a commuted rate system?

* * * * *

(c) Rate table information and the commuted rate schedule can be found at *www.gsa.gov/relocationpolicy* or the appropriate office designated in your agency.

[FR Doc. 2013–29212 Filed 12–11–13; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2013–0002; Internal Agency Docket No. FEMA–8313]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP) that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date. Also, information identifying the current participation status of a community can be obtained from FEMA's Community Status Book (CSB). The CSB is available at *http://www.fema.gov/fema/csb.shtm.*

DATES: *Effective Dates:* The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2953.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase Federal flood insurance that is not otherwise generally available from private insurers. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits the sale of NFIP flood insurance unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR Part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. We recognize that some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue to be eligible for the sale of NFIP flood insurance. A notice withdrawing the suspension of such communities will be published in the **Federal Register**.

In addition, FEMA publishes a Flood Insurance Rate Map (FIRM) that identifies the Special Flood Hazard Areas (SFHAs) in these communities. The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year on FEMA's initial FIRM for the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment procedures under 5 U.S.C. 553(b), are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, Section 1315, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR Part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain federal assistance no longer available in SFHAs
Region III				
Pennsylvania: Allegheny, Township of, Venango County.	422529	August 5, 1981, Emerg; September 10, 1984, Reg; January 16, 2014, Susp.	Jan. 16, 2014 ...	Jan. 16, 2014.
Canal, Township of, Venango County	422108	May 9, 1979, Emerg; February 6, 1991, Reg; January 16, 2014, Susp.	......do *	Do.
Clinton, Township of, Venango County	422531	February 18, 1976, Emerg; September 10, 1984, Reg; January 16, 2014, Susp.	......do	Do.
Clintonville, Borough of, Venango County.	422532	December 17, 1976, Emerg; September 10, 1984, Reg; January 16, 2014, Susp.	......do	Do.
Cooperstown, Borough of, Venango County.	420835	July 7, 1975, Emerg; February 6, 1991, Reg; January 16, 2014, Susp.	......do	Do.
Cornplanter, Township of, Venango County.	422533	July 7, 1975, Emerg; May 19, 1987, Reg; January 16, 2014, Susp.	......do	Do.
Emlenton, Borough of, Venango County.	422107	July 23, 1975, Emerg; June 30, 1976, Reg; January 16, 2014, Susp.	......do	Do.
Franklin, City of, Venango County	420836	April 19, 1973, Emerg; September 29, 1978, Reg; January 16, 2014, Susp.	......do	Do.
French Creek, Township of, Venango County.	422110	February 17, 1977, Emerg; May 19, 1987, Reg; January 16, 2014, Susp.	......do	Do.
Irwin, Township of, Venango County ...	422534	N/A, Emerg; April 29, 2009, Reg; January 16, 2014, Susp.	......do	Do.
Jackson, Township of, Venango County.	422535	March 8, 1977, Emerg; August 19, 1991, Reg; January 16, 2014, Susp.	......do	Do.
Mineral, Township of, Venango County	422536	May 9, 1979, Emerg; January 1, 1987, Reg; January 16, 2014, Susp.	......do	Do.
Oakland, Township of, Venango County.	422111	February 28, 1977, Emerg; February 1, 1987, Reg; January 16, 2014, Susp.	......do	Do.
Oil City, City of, Venango County	420837	August 18, 1972, Emerg; July 5, 1977, Reg; January 16, 2014, Susp.	......do	Do.
Oil Creek, Township of, Venango County.	422537	March 17, 1976, Emerg. October 1, 1986, Reg; January 16, 2014, Susp.	......do	Do.
Pinegrove, Township of Venango County.	422538	January 14, 1980, Emerg; September 10, 1984, Reg; January 16, 2014, Susp.	......do	Do.
Plum, Township of, Venango County ...	422539	March 1, 1977, Emerg; September 10, 1984, Reg; January 16, 2014, Susp.	......do	Do.
Polk, Borough of, Venango County	420838	July 10, 1975, Emerg; January 1, 1987, Reg; January 16, 2014, Susp.	......do	Do.
President, Township of, Venango County.	422112	July 7, 1975, Emerg; February 6, 1991, Reg; January 16, 2014, Susp.	......do	Do.
Richland, Township of, Venango County.	422540	February 24, 1977, Emerg; September 10, 1984, Reg; January 16, 2014, Susp.	......do	Do.
Rockland, Township of, Venango County.	422113	March 3, 1977, Emerg; October 16, 1990, Reg; January 16, 2014, Susp.	......do	Do.
Rouseville, Borough of, Venango County.	420839	July 11, 1975, Emerg; May 19, 1987, Reg; January 16, 2014, Susp.	......do	Do.
Sandycreek, Township of, Venango County.	422541	June 23, 1975, Emerg; October 16, 1990, Reg; January 16, 2014, Susp.	......do	Do.
Scrubgrass, Township of, Venango County.	422542	February 24, 1977, Emerg; August 5, 1991, Reg; January 16, 2014, Susp.	......do	Do.
Sugarcreek, Borough of, Venango County.	420840	July 7, 1975, Emerg; May 19, 1987, Reg; January 16, 2014, Susp.	......do	Do.
Utica, Borough of, Venango County	420841	February 10, 1977, Emerg; March 4, 1991, Reg; January 16, 2014, Susp.	......do	Do.
Victory, Township of, Venango County	422543	February 17, 1977, Emerg; September 24, 1984, Reg; January 16, 2014, Susp.	......do	Do.
Region IV				
Alabama:				
Brookwood, Town of, Tuscaloosa County.	010431	N/A, Emerg; October 21, 2008, Reg; January 16, 2014, Susp.	......do	Do.
Coaling, Town of, Tuscaloosa County	010480	N/A, Emerg; July 8, 2008, Reg; January 16, 2014, Susp.	......do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain federal assistance no longer available in SFHAs
Coker, Town of, Tuscaloosa County	010481	N/A, Emerg; August 14, 2008, Reg; January 16, 2014, Susp.	......do	Do.
Lake View, Town of, Jefferson and Tuscaloosa Counties.	010483	N/A, Emerg; May 8, 2008, Reg; January 16, 2014, Susp.	......do	Do.
Moundville, Town of, Hale and Tuscaloosa Counties.	010096	October 11, 1974, Emerg; July 18, 1985, Reg; January 16, 2014, Susp.	......do	Do.
Northport, City of, Tuscaloosa County	010202	June 13, 1973, Emerg; September 5, 1979, Reg; January 16, 2014, Susp.	......do	Do.
Tuscaloosa, City of, Tuscaloosa County.	010203	April 5, 1973, Emerg; February 1, 1979, Reg; January 16, 2014, Susp.	......do	Do.
Tuscaloosa County, Unincorporated Areas.	010201	N/A, Emerg; August 7, 2001, Reg; January 16, 2014, Susp.	......do	Do.
Vance, Town of, Bibb and Tuscaloosa Counties.	010428	N/A, Emerg; June 26, 2006, Reg; January 16, 2014, Susp.	......do	Do.
Woodstock, Town of, Bibb and Tuscaloosa Counties.	015013	N/A, Emerg; January 30, 2008, Reg; January 16, 2014, Susp.	......do	Do.
South Carolina: Bowman, Town of, Orangeburg County.	450161	June 27, 1975, Emerg; July 16, 1980, Reg; January 16, 2014, Susp.	......do	Do.
Holly Hill, Town of, Orangeburg County	450163	August 19, 1976, Emerg; July 2, 1980, Reg; January 16, 2014, Susp.	......do	Do.
Norway, Town of, Orangeburg County	450213	November 11, 1975, Emerg; May 27, 1977, Reg; January 16, 2014, Susp.	......do	Do.
Orangeburg, City of, Orangeburg County.	450164	February 28, 1975, Emerg; July 16, 1980, Reg; January 16, 2014, Susp.	......do	Do.
Orangeburg County, Unincorporated Areas.	450160	November 26, 1976, Emerg; December 16, 1980, Reg; January 16, 2014, Susp.	......do	Do
Region V				
Indiana:				
Brookville, Town of, Franklin County ...	180069	March 13, 1975, Emerg; November 15, 1984, Reg; January 16, 2014, Susp.	......do	Do.
Cedar Grove, Town of, Franklin County.	180304	November 22, 1975, Emerg; August 5, 1986, Reg; January 16, 2014, Susp.	......do	Do.
Laurel, Town of, Franklin County	180306	May 27, 1975, Emerg; September 1, 1988, Reg; January 16, 2014, Susp.	......do	Do.
Region VII				
Kansas:				
Miami County, Unincorporated Areas ..	200220	November 6, 1995, Emerg; December 1, 2006, Reg; January 16, 2014, Susp.	......do	Do.
Osawatomie, City of, Miami County	200223	June 13, 1974, Emerg; September 19, 1984, Reg; January 16, 2014, Susp.	......do	Do.
Region VIII				
Wyoming:				
Dayton, Town of, Sheridan County	560045	May 28, 1975, Emerg; August 1, 2008, Reg; January 16, 2014, Susp.	......do	Do.
Ranchester, Town of, Sheridan County	560046	May 8, 1978, Emerg; April 15, 1988, Reg; January 16, 2014, Susp.	......do	Do.
Sheridan, City of, Sheridan County	560044	November 29, 1974, Emerg; September 1, 1978, Reg; January 16, 2014, Susp.	......do	Do.
Sheridan County, Unincorporated Areas.	560047	September 25, 1979, Emerg; August 1, 1986, Reg; January 16, 2014, Susp.	......do	Do.

* -do- = Ditto.

Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: November 25, 2013.

David L. Miller,

Associate Administrator, Federal Insurance and Mitigation Administration, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2013–29658 Filed 12–11–13; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 100217096–1059–02]

RIN 0648–AY63

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS, upon application from BP Exploration (Alaska) Inc. (BP), is issuing regulations pursuant to the Marine Mammal Protection Act (MMPA) to govern the unintentional taking of marine mammals incidental to operation of offshore oil and gas facilities in the U.S. Beaufort Sea, Alaska, for the period January 2014–January 2019. These regulations, which allow for the issuance of Letters of Authorization (LOAs) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective from January 13, 2014 through January 14, 2019.

ADDRESSES: A copy of BP's application and NMFS' Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) may be obtained by writing to Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East West Highway, Silver Spring, MD 20910, calling the contact listed under **FOR FURTHER INFORMATION CONTACT**, or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Documents cited in this final rule may also be viewed, by appointment, during regular business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) during periods of not more than five consecutive years each if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as: ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

On November 6, 2009, NMFS received an application from BP requesting authorization for the take of six marine mammal species incidental to operation of the Northstar development in the Beaufort Sea, Alaska, over the course of 5 years, which would necessitate the promulgation of new five-year regulations. Construction of Northstar was completed in 2001. The proposed activities for 2014–2019 include a continuation of drilling operations (although likely in a very limited manner), production, and emergency training operations but no construction or activities of similar intensity to those conducted between 1999 and 2001. The likely or possible impacts of the planned continuing operations at Northstar on marine mammals involve both non-acoustic and acoustic effects. Potential non-acoustic effects could result from the physical presence of personnel, structures and equipment, construction or maintenance activities, and the occurrence of oil spills. Petroleum development and associated activities in marine waters introduce sound into the environment, produced by island construction, maintenance, and drilling, as well as vehicles operating on the ice, vessels, aircraft, generators, production machinery, gas flaring, and camp operations. BP requested authorization to take individuals of three cetacean and three pinniped species by Level B Harassment. They are: bowhead, gray, and beluga whales and ringed, bearded, and spotted seals. Further, BP requested authorization to take five individual ringed seals by injury or mortality annually over the course of the 5-year rule. In this final rule, NMFS has authorized the take by Level B harassment of all six species listed here and the take by injury or mortality of ringed seals.

Description of the Specified Activity

Background on the Northstar Development Facility

BP is currently producing oil from an offshore development in the Northstar Unit (see Figure 1 in BP's application). This development is the first in the Beaufort Sea that makes use of a subsea pipeline to transport oil to shore and then into the Trans-Alaska Pipeline System. The Northstar facility was built in State of Alaska waters on the remnants of Seal Island approximately 6 mi (9.5 km) offshore from Point Storkersen, northwest of the Prudhoe Bay industrial complex, and 3 mi (5 km) seaward of the closest barrier island. It is located approximately 54 mi (87 km) northeast of Nuiqsut, an Inupiat community.

The main facilities associated with Northstar include a gravel island work surface for drilling and oil production facilities and two pipelines connecting the island to the existing infrastructure at Prudhoe Bay. One pipeline transports crude oil to shore, and the second imports gas from Prudhoe Bay for gas injection at Northstar. Permanent living quarters and supporting oil production facilities are also located on the island.

The construction of Northstar began in early 2000 and continued through 2001. BP states that activities with similar intensity to those that occurred during the construction phase between 2000 and 2001 are not planned or expected for any date within the 5-year period that would be governed by these regulations. Well drilling began on December 14, 2000, and oil production commenced on October 31, 2001. Additional background was contained in the proposed rule (76 FR 39706, July 6, 2011) and can also be found in BP's application (see **ADDRESSES**).

Expected Activities in 2014–2019

During the 5-year period from January 2014–January 2019, BP intends to continue production and emergency training operations. As mentioned previously, drilling is not specifically planned for the 2014–2019 time period but may be required at some point in the future. The activities described in the proposed rule could occur at any time during the 5-year period. Table 2 in BP's application (see **ADDRESSES**) summarizes the vehicles and machinery used during BP's Northstar activities since the development of Northstar Island. Although not all of these activities are planned to take place during the January 2014-January 2019 operational phase, some of the equipment may be required to repair or replace existing structures or infrastructure on Northstar in the future. A detailed overview of all potential activities, such as transportation, production and drilling operations, repair and maintenance activities, and emergency and oil spill response training, was provided in the proposed rule (76 FR 39706, July 6, 2011). No changes have been made to any of the proposed activities.

Northstar Sound Characteristics

During continuing production activities at Northstar, sounds and non-acoustic stimuli will be generated by vehicle traffic, vessel operations, helicopter operations, drilling, and general operations of oil and gas facilities (e.g., generator sounds and gas flaring). The sounds generated from transportation activities will be detectable underwater and/or in air some distance away from the area of activity. The distance will depend on the nature of the sound source, ambient noise conditions, and the sensitivity of the receptor. Take of marine mammals by Level B harassment incidental to the activities mentioned in this document could occur for the duration of these regulations. The type and significance of the harassment is likely to depend on the species and activity of the animal at the time of reception of the stimulus, as well as the distance from the sound source and the level of the sound relative to ambient conditions. The proposed rule (76 FR 39706, July 6, 2011) contained a detailed description of construction, operational, and transportation sounds that could be introduced into the marine and in-air environments. No changes have been made to that information.

Description of Marine Mammals in the Area of the Specified Activity

The Beaufort Sea supports a diverse assemblage of marine mammals, including: bowhead, gray, beluga, killer, minke, and humpback whales; harbor porpoises; ringed, ribbon, spotted, and bearded seals; narwhals; polar bears; and walruses. The bowhead and humpback whales and polar bear are listed as ''endangered'' under the Endangered Species Act (ESA) and as depleted under the MMPA. The ringed and bearded seals are listed as ''threatened'' under the ESA. Certain stocks or populations of gray, beluga, and killer whales and spotted seals are listed as endangered; however, none of those stocks or populations occur in the activity area. Additionally, the ribbon seal is considered a ''species of concern'' under the ESA. Both the walrus and the polar bear are managed by the U.S. Fish and Wildlife Service (USFWS) and are not considered further in this final rule.

Of the species mentioned here, the ones that are most likely to occur near the Northstar facility include: bowhead, gray, and beluga whales and ringed, bearded, and spotted seals. Ringed seals are year-round residents in the Beaufort Sea and are anticipated to be the most frequently encountered species in the project area. Bowhead whales are anticipated to be the most frequently encountered cetacean species in the project area; however, their occurrence is not anticipated to be year-round. The most common time for bowheads to occur near Northstar is during the fall migration westward through the Beaufort Sea, which typically occurs from late August through October each year.

The proposed rule contains a discussion of six species that are not considered further in the analysis because of their rarity in the project area. The ''Description of Marine Mammals in the Area of the Specified Activity'' has not changed from the proposed rule. Please refer to the proposed rule (76 FR 39706, July 6, 2011) for the complete discussion. BP's application contains information on the status, distribution, seasonal distribution, abundance, and life history functions of each of the six species under NMFS jurisdiction likely to be impacted by the proposed activities. When reviewing the application, NMFS determined that the species descriptions provided by BP correctly characterized the status, distribution, seasonal distribution, and abundance of each species. Please refer to the application for that information (see **ADDRESSES**). Additional information can also be found in the NMFS Stock Assessment Reports (SAR). The Alaska 2012 SAR is available at: *http://www.nmfs.noaa.gov/pr/sars/pdf/ak2012.pdf.*

Brief Background on Marine Mammal Hearing

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms have been derived using auditory evoked potentials, anatomical modeling, and other data. Southall *et al.* (2007) designate ''functional hearing groups'' for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): functional hearing is estimated to occur between approximately 7 Hz and 22 kHz (however, a study by Au *et al.* (2006) of humpback whale songs indicate that the range may extend to at least 24 kHz);
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): functional hearing is estimated to occur between approximately 200 Hz and 180 kHz;
- Pinnipeds in Water: functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz; and

• Pinnipeds in Air: functional hearing is estimated to occur between approximately 75 Hz and 30 kHz.

As mentioned previously in this document, six marine mammal species (three cetacean and three pinniped species) are likely to occur in the Northstar facility area. Of the three cetacean species likely to occur in BP's project area, two are classified as low frequency cetaceans (i.e., bowhead and gray whales) and one is classified as a mid-frequency cetacean (i.e., beluga whales) (Southall *et al.,* 2007). The proposed rule (76 FR 39706, July 6, 2011) contains a detailed discussion regarding available information on underwater audiograms and vocalizations of some of the marine mammals in the area. That information has not changed and is not repeated here.

Potential Effects of the Specified Activity on Marine Mammals

With respect to the MMPA, NMFS' effects assessment serves four primary purposes: (1) To prescribe the permissible methods of taking (i.e., Level B Harassment or mortality, including an identification of the number and types of take that could occur by Level B harassment or mortality) and to prescribe other means of effecting the least practicable adverse impact on such species or stock and its habitat (i.e., mitigation); (2) to determine whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival); (3) to determine whether the specified activity will have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses; and (4) to prescribe requirements pertaining to monitoring and reporting.

The likely or possible impacts of the planned offshore oil developments at Northstar on marine mammals involve both non-acoustic and acoustic effects. Potential non-acoustic effects could result from the physical presence of personnel, structures and equipment, construction or maintenance activities, and the occurrence of oil spills. In winter, during ice road construction, and in spring, flooding on the sea ice may displace some ringed seals along the ice road corridor. There is a small chance that a seal pup might be injured or killed by on-ice construction or transportation activities. A major oil spill is unlikely and, if it occurred, its effects are difficult to predict.

Petroleum development and associated activities in marine waters introduce sound into the environment, produced by island construction, maintenance, and drilling, as well as vehicles operating on the ice, vessels, aircraft, generators, production machinery, gas flaring, and camp operations. The potential effects of sound from the activities might include one or more of the following: masking of natural sounds; behavioral disturbance and associated habituation effects; and, at least in theory, temporary or permanent hearing impairment (Richardson *et al.,* 1995b). However, for reasons discussed in the proposed rule, it is unlikely that there would be any cases of temporary, or especially permanent, hearing impairment resulting from these activities.

In the ''Potential Effects of Specified Activities on Marine Mammals'' section of the proposed rule, NMFS included a qualitative discussion of the different ways that activities at Northstar may potentially affect marine mammals, which included detailed discussions regarding the potential effects of sound and oil on cetaceans and pinnipeds. Marine mammals may experience masking and behavioral disturbance. However, some of the effects are expected to be less for cetaceans, as the higher sound levels are found close to shore, usually further inshore than the migration paths of cetaceans. Additionally, cetaceans are not found in the Northstar area during the ice-covered season; therefore, they would only be potentially impacted during certain times of the year. The information contained in the ''Potential Effects of Specified Activities on Marine Mammals'' section from the proposed rule has not changed. Please refer to the proposed rule for the full discussion (76 FR 39706, July 6, 2011).

Anticipated Effects on Marine Mammal Habitat

Potential impacts to marine mammals and their habitat as a result of operation of the Northstar facility are mainly associated with elevated sound levels. These underwater sound levels will likely cause some fish and invertebrate species to either exhibit a behavioral reaction or temporarily disperse from or avoid areas close to Northstar for a limited time. There is also the potential for impacts to marine mammal habitat from ice road construction and an oil spill (should one occur). Ringed seals build subnivean lairs in the Beaufort Sea in the spring months. The amount of habitat altered by Northstar ice road construction is minimal compared to the overall habitat available in the region. In the unlikely event of a large or very large oil spill, marine mammal prey species could be oiled, or the marine mammals themselves could be oiled. BP integrated several design features and conducts regular inspections and maintenance to reduce the potential for oil spills on the island or in the marine environment. The proposed rule contained a full discussion of the potential impacts to marine mammal habitat and prey species in the project area. No changes have been made to that discussion. Please refer to the proposed rule for the full discussion of potential impacts to marine mammal habitat (76 FR 39706, July 6, 2011), which includes a discussion of common marine mammal prey species in the area. In conclusion, NMFS has determined that BP's operation of the Northstar Development area is not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or on the food sources that they utilize.

Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(A) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for subsistence uses (where relevant).

As part of its application, BP proposed several mitigation measures in order to ensure the least practicable adverse impact on marine mammal species that may occur in the project area. BP proposed different mitigation measures for the ice-covered season and for the open-water season. The proposed mitigation measures are described fully in BP's application (see **ADDRESSES**) and summarized here. After a review of these measures and comments from the peer review panel and public (see the ''*Monitoring Plan Peer Review''* and ''Comments and Responses'' sections later in this document), NMFS determined that some measures should be modified or added in order to effect the least practicable adverse impact on the species or stock and its habitat. Those additions are summarized here and described in more detail later in this document.

Ice-Covered Season Mitigation Measures

In order to reduce impacts to ringed seal construction of birth lairs, BP must begin winter construction activities (e.g., ice road construction) on the sea ice as early as possible once weather and ice conditions permit such activities. Any ice road or other construction activities that are initiated after March 1 in previously undisturbed areas in waters deeper than 10 ft (3 m) must be surveyed, using trained dogs, in order to identify and avoid ringed seal structures by a minimum of 492 ft (150 m). If dog surveys are conducted, trained dogs shall search all floating sea ice for any ringed seal structures. Those surveys shall be done prior to the new proposed activity on the floating sea ice to provide information needed to prevent injury or mortality of young seals. Additionally, after March 1 of each year, activities should avoid, to the greatest extent practicable, disturbance of any located seal structure. It should be noted that since 2001, none of BP's activities took place after March 1 in previously undisturbed areas, so no on-ice searches were conducted.

Open-Water Season Mitigation Measures

All non-essential boat, hovercraft, barge, and air traffic shall be scheduled to avoid periods when whales (especially bowhead whales) are migrating through the area. Helicopter flights to support Northstar activities shall be limited to a corridor from Seal Island to the mainland, and, except when limited by weather or personnel safety, shall maintain a minimum altitude of 1,000 ft (305 m), except during takeoff and landing.

Impact hammering activities may occur at any time of year to repair sheet pile or dock damage due to ice impingement. Impact hammering is most likely to occur during the ice-covered season or break-up period and would not be scheduled during the fall bowhead migration. However, if such activities were to occur during the open-water or broken ice season, certain mitigation measures described here are required to be implemented. Based on studies by Blackwell *et al.* (2004a), it is predicted that only impact driving of sheet piles or pipes that are in the water (i.e., those on the dock) could produce received levels of 190 dB re 1 µPa (rms) and then only in immediate proximity to the pile. The impact pipe driving in June and July 2000 did not produce received levels as high as 180 dB re 1 µPa (rms) at any location in the water. This was attributable to attenuation by the gravel and sheet pile walls (Blackwell *et al.,* 2004a). BP anticipates that received levels for any pile driving that might occur within the sheet pile walls of the island in the future would also be less than 180 dB (rms) at all locations in the water around the island. If impact pile driving were planned in areas outside the sheet pile walls, it is possible that received levels underwater might exceed the 180 dB re 1 µPa (rms) level.

NMFS has established acoustic thresholds that identify the received sound levels above which hearing impairment or other injury could potentially occur, which are 180 and 190 dB re 1 µPa (rms) for cetaceans and pinnipeds, respectively (NMFS, 1995, 2000). To prevent or at least minimize exposure to sound levels that might cause hearing impairment, an exclusion zone shall be established and monitored for the presence of seals and whales. Establishment of the exclusion zone of any source predicted to result in received levels underwater above 180 dB (rms) will be analyzed using existing data collected in the waters of the Northstar facility (see the ''Monitoring and Reporting'' section later in this document or BP's application).

If observations and mitigation are required, a protected species observer stationed at an appropriate viewing location on the island will conduct watches commencing 30 minutes prior to the onset of impact hammering or other identified activity and will continue throughout the activity and for 30 minutes after the activity ends. The ''Monitoring and Reporting'' section later in this document contains a description of the observer program. If pinnipeds are seen within the 190 dB re 1 µPa radius (the ''exclusion zone''), then operations shall shut down or reduce SPLs sufficiently to ensure that received SPLs do not exceed those prescribed here (i.e., power down). If whales are observed within the 180 dB re 1 µPa (rms) radius (the ''exclusion zone''), operations shall shut down or reduce SPLs sufficiently to ensure that received SPLs do not exceed those prescribed here (i.e., power down). The shutdown or reduced SPL shall be maintained until such time as the observed marine mammal(s) has been seen to have left the applicable exclusion zone or until 15 minutes have elapsed in the case of a pinniped or odontocete or 30 minutes in the case of a mysticete without resighting, whichever occurs sooner.

In response to a recommendation from the public, a ramp-up technique shall be used at the beginning of each day's in-water pile driving activities and if pile driving resumes after it has ceased for more than 1 hour. If a vibratory driver is used, BP is required to initiate sound from vibratory hammers for 15 seconds at reduced energy followed by a 1-minute waiting period. The procedure shall be repeated two additional times before full energy may be achieved. If a non-diesel impact hammer is used, BP is required to provide an initial set of strikes from the impact hammer at reduced energy, followed by a 1-minute waiting period, then two subsequent sets. If a diesel impact hammer is used, BP is required to turn on the sound attenuation device for 15 seconds prior to initiating pile driving.

Should any new drilling into oil-bearing strata be required during the effective period of these regulations, the drilling shall not take place during either open-water or spring-time broken ice conditions.

Oil Spill Contingency Plan

The taking by harassment, injury, or mortality of any marine mammal species incidental to an oil spill is prohibited. However, in the unlikely event of an oil spill, BP expects to be able to contain oil through its oil spill response and cleanup protocols. An oil spill prevention and contingency response plan was developed and approved by the Alaska Department of Environmental Conservation, U.S. Department of Transportation, U.S. Coast Guard, and Bureau of Safety and Environmental Enforcement (BSEE; formerly MMS). The plan is reviewed annually and revised and updated when changes occur. BP's plan has been amended several times since its initial approval, with the last revision occurring in March 2012. Major changes since 1999 include the following: Seasonal drilling restrictions from June 1 to July 20 and from October 1 until ice becomes 18 in (46 cm) thick; changes to the response planning standard for a well blowout as a result of reductions in well production rates; and deletion of ice auguring for monitoring potential sub-sea oil pipeline leaks during winter following demonstration of the LEOS leak detection system. Many of the most recent changes were made in response to new BSEE regulations relating to updated safety standards and practices. Future changes to the response planning standards may be expected in response to declines in well production rates and pipeline throughput. The proposed rule (76 FR 39706, July 6, 2011) contained a summary of the plan's components. Please refer to that document. Additionally, the March 2012 version of BP's oil spill contingency plan can be viewed on the Internet at: *http://*

www.nmfs.noaa.gov/pr/permits/incidental.htm.

Mitigation Conclusions

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures recommended by the public, NMFS has determined that the mitigation measures described above provide the means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance. Measures to ensure availability of such species or stock for taking for certain subsistence uses are discussed later in this document (see ''Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses'' section).

Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must, where applicable, set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

The monitoring program proposed by BP in its application and described here is based on the continuation of previous monitoring conducted at Northstar. Information on previous monitoring can be found in the ''Previous Activities and Monitoring'' section found later in this document. The monitoring program has been modified based on comments received from the public and the peer review panel (see the ''*Monitoring Plan Peer Review''* and ''Comments and Responses'' sections later in this document).

BP's monitoring focuses on ringed seals and bowhead whales, as they are the most prevalent species found in the Northstar Development area. No monitoring is proposed specifically for bearded or spotted seals or for gray or beluga whales, as their occurrence near Northstar is limited. However, opportunistic data may be collected for these species should they occur in the area (e.g., vocalizations may be recorded on the acoustic array). Few, if any, observations of these species were made during the intensive monitoring from 1999 to 2004. If sightings of these (or other) species are made, those observations will be included in the monitoring reports (described later in this document) that will be prepared.

Annual Monitoring Plans

BP will continue the long-term observer program, conducted by island personnel, of ringed seals during the spring and summer. This program is intended to assess the continued long-term stability of ringed seal abundance and habitat use near Northstar as indexed by counts obtained on a regular and long-term basis. Northstar staff will count seals at Northstar from May 15–July 15 each year from the 108 ft (33 m) high process module following a standardized protocol since 2005. Counts are made on a daily basis (weather permitting), between 11:00–19:00, in an area of approximately 3,117 ft (950 m) around the island, for a duration of approximately 15 minutes. Counts will only be made during periods with visibility of 0.62 mi (1 km) or more and with a cloud ceiling of more than 295 ft (90 m). This year, BP will also begin to record the date of the first appearance of basking seals and the peak date of haul out. Also, BP will begin to attempt conducting seal counts in autumn using the same general approach as noted here for the May 15-July 15 timeframe. However, these counts will be limited by the amount of available daylight.

BP will continue monitoring the bowhead migration in 2014 and subsequent years for approximately 30 days each September through the recording of bowhead calls. BP will deploy a Directional Autonomous Seafloor Acoustic Recorder (DASAR; Greene *et al.,* 2004) or similar recorder about 9.3 mi (15 km) north of Northstar, consistent with a location used in past years (as far as conditions allow). The data of the offshore recorder can provide information on the total number of calls detected, the temporal pattern of calling during the recording period, possibly the bearing to calls, and call types. These data can be compared with corresponding data from the same site in previous years. If substantially higher or lower numbers of calls are recorded than were recorded at that site in previous years, further analyses and additional monitoring will be considered in consultation with NMFS and North Slope Borough (NSB) representatives. A second DASAR, or similar recorder, will be deployed at the same location to provide a reasonable level of redundancy.

In addition to the DASAR already mentioned, BP will install an acoustic recorder about 1,476 ft (450 m) north of Northstar, in the same area where sounds have been recorded since 2001. This recorder will be installed for approximately 30 days each September, corresponding with the deployment of the offshore DASAR (or similar recorder). The near-island recorder will be used to record and quantify sound levels emanating from Northstar. If island sounds are found to be significantly stronger or more variable than in the past, and if it is expected that the stronger sounds will continue in subsequent years, then further consultation with NMFS and NSB representatives will occur to determine if more analyses or changes in monitoring strategy are appropriate. A second acoustic recorder will be deployed to provide a reasonable level of redundancy.

Based on recommendations from the peer review panel, BP will hold an annual meeting with representatives from NMFS and NSB (likely in the late winter/early spring period) to discuss whether or not data collected in the previous year regarding seal counts and bowhead whale call rates should trigger additional or revised monitoring requirements. Additional information regarding this meeting can be found later in this document.

Contingency Monitoring Plans

If BP needs to conduct an activity (i.e., pile driving) capable of producing pulsed underwater sound with levels ≥180 or ≥190 dB re 1 μPa (rms) at locations where whales or seals could be exposed, BP will monitor exclusion zones defined by those levels. [The exclusion zones were described in the ''Mitigation'' section earlier in this document.] One or more on-island observers, as necessary to scan the area of concern, will be stationed at location(s) providing an unobstructed view of the predicted exclusion zone. The observer(s) will scan the exclusion zone continuously for marine mammals for 30 minutes prior to the operation of the sound source. Observations will continue during all periods of operation and for 30 minutes after the activity has ended. If whales and seals are detected within the (respective) 180 or 190 dB distances, a shutdown or other appropriate mitigation measure (as described earlier in this document) shall be implemented. The sound source will be allowed to operate again when the marine mammals are observed to leave the safety zone or until 15 minutes have elapsed in the case of a pinniped or odontocete or 30 minutes in the case of a mysticete without resighting, whichever occurs sooner. The observer will record the: (1) Species and numbers of marine mammals seen within the 180 or 190 dB zones; (2) bearing and distance of the marine mammals from the observation point; and (3) behavior of marine mammals and any indication of disturbance reactions to the monitored activity.

If BP initiates significant on-ice activities (e.g., construction of new ice roads, trenching for pipeline repair, or projects of similar magnitude) in previously undisturbed areas after March 1, trained dogs, or a comparable method, will be used to search for seal structures. If such activities do occur after March 1, a follow-up assessment must be conducted in May of that year to determine the fate of all seal structures located during the March monitoring. This monitoring must be conducted by a qualified biological researcher approved in advance by NMFS after a review of the observer's qualifications.

BP will conduct acoustic measurements to document sound levels, characteristics, and transmissions of airborne sounds with expected source levels of 90 dBA or greater created by on-ice activity at Northstar that have not been measured in previous years. In addition, BP will conduct acoustic measurements to document sound levels, characteristics, and transmissions of airborne sounds for sources on Northstar Island with expected received levels at the water's edge that exceed 90 dBA that have not been measured in previous years. These data will be collected in order to assist in the development of future monitoring and mitigation measures.

Monitoring Plan Peer Review

The MMPA requires that monitoring plans be independently peer reviewed ''where the proposed activity may affect the availability of a species or stock for taking for subsistence uses'' (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state, ''Upon receipt of a complete monitoring plan, and at its discretion, [NMFS] will either submit the plan to members of a peer review panel for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan'' (50 CFR 216.108(d)).

NMFS convened an independent peer review panel, comprised of experts in the fields of marine mammal ecology and underwater acoustics, to review BP's proposed monitoring plan associated with the MMPA application for these regulations. The panel met on March 10, 2011, and provided their final report to NMFS on June 17, 2011. The panel's final report can be found on the Internet at: *http://www.nmfs.noaa.gov/pr/pdfs/permits/bp_northstar_peer_review.pdf*.

NMFS provided the panel with BP's monitoring plan and asked the panel to answer the following questions regarding the plan:

(1) Are the applicant's stated objectives the most useful for understanding impacts on marine mammals and otherwise accomplishing the goals of: Documenting the effects of the activity (including acoustic) on marine mammals; documenting or estimating the actual level of take as a result of the activity (in this case, operation of an oil production facility); increasing the knowledge of the affected species; or increasing knowledge of the anticipated impacts on marine mammal populations?

(2) Are the applicant's stated objectives able to be achieved based on the methods described in the plan?

(3) Are there techniques not proposed by the applicant, or modifications to the techniques proposed by the applicant, that should be considered for inclusion in the applicant's monitoring program to better accomplish the goals stated above?

(4) What is the best way for an applicant to present their data and results (formatting, metrics, graphics, etc.) in the required reports that are to be submitted to NMFS?

NMFS has reviewed the report and evaluated all recommendations made by the panel and has determined that there are several measures that BP can incorporate into its marine mammal monitoring plan to improve it. NMFS reviewed the panel's recommendations and determined that several are appropriate for BP to carry out during the effective period of these regulations. Those recommendations have been discussed with BP and are included in the final rule, as appropriate. A summary of the recommendations that have been incorporated into BP's monitoring plan and how they are being addressed is provided in Table 1 of this document.

TABLE 1—RECOMMENDATIONS FROM THE 2011 BP PEER REVIEW PANEL THAT WILL BE CARRIED OUT AND/OR INCORPORATED INTO BP'S MONITORING PLAN FOR THIS FINAL RULE

Panel recommendation	BP Response/commitment
BP should attempt to assess the duration of deflection (i.e., the amount of time or distance before deflected whales returned to their normal migratory path) of bowheads away from Northstar Island, if possible. Other data sets (i.e., Bowhead Whale Aerial Survey Program [BWASP], Shell acoustic data) might prove useful for addressing this question.	Because of the relatively low sound levels emanating from Northstar into the bowhead whale migration corridor and the subtle responses of the whales, detecting deflection immediately north of Northstar was challenging, but statistically significant deflection was detected in 2001–2004. Shell's arrays west of Northstar were not in the water in 2001–2004, when BP documented statistically significant deflection north of the island. BWASP lacks the resolution needed for meaningful assessment of deflection duration. BP has initiated a scoping project to better understand alternative methods of call tracking in the context of Northstar. If this scoping exercise yields promising results, BP will consider reanalysis of existing data from 2001–2004 with the hope of better understanding deflection duration west of Northstar.

TABLE 1—RECOMMENDATIONS FROM THE 2011 BP PEER REVIEW PANEL THAT WILL BE CARRIED OUT AND/OR INCORPORATED INTO BP'S MONITORING PLAN FOR THIS FINAL RULE—Continued

Panel recommendation	BP Response/commitment
BP should continue to use their proposed approach for counting seals. Additional data should be collected to help interpret the counts, including: recording on-island activities and correlate them with seal numbers. (It is likely that counts of seals will be influenced mostly by onset of spring, however, numbers should also be assessed relative to island activity to investigate whether those activities impact the numbers of seals counted from the island.).	BP will continue seal monitoring. If Northstar undertakes substantial work during the basking season, it might make sense to undertake a behavioral study using island-based observers before, during, and after the work. BP suggests further discussions of this option during annual planning meetings (described below) if substantial work is planned during the basking season.
Previously collected seal data should be analyzed for the date when seals are first seen and the peak date of haul out.	BP agrees to begin reporting dates of the first appearance of basking seals and peak basking dates beginning in 2014.
Counts of seals hauled out on ice in the late autumn or early winter would help assess seal use of the area near Northstar at times other than the spring and early summer.	Limited daylight will make this challenging, but BP agrees to attempt autumn observations for basking seals using the same general approach that is used during breakup and will include results in the 2014 annual report if these results are available before the report is finalized (otherwise, results will be reported for the 2011 autumn counts in the 2015 annual report).
Counts of seals are intended as a broad measure of use of the area around the island. One component of the counts is to determine whether additional monitoring is needed, yet no specific thresholds have been identified that might trigger additional monitoring. Thresholds should be established for the initiation of discussions about additional monitoring.	Due to the large range in seal counts from year to year, BP prefers not to set a priori thresholds but rather to formalize annual discussions about planned monitoring. These discussions should be based not only on specific numbers of seals observed but also on circumstances surrounding those observations and other information. These discussions would also allow for consensus building regarding design of additional monitoring. BP suggests that a formal discussion to specifically address monitoring requirements (for seals, whales, and acoustical measurements) should be held annually with representatives from BP, NMFS, and the North Slope Borough (NSB). Results of these discussions would be summarized in a section of the required annual report.
Thresholds should also be established related to calling rates for initiation of discussions about additional monitoring of bowheads.	See the response to the previous recommendation. This would be part of the annual monitoring discussions between BP, NMFS, and the NSB.
BP should incorporate environmental factors (i.e., sea ice extent, wind, etc.) in addition to anthropogenic activities, as a covariate in analyses of impacts from Northstar Island on bowheads.	Because of the inherent difficulties in adding multiple variables to such analyses, BP suggests that this be discussed at the annual monitoring meeting between BP, NMFS, and the NSB.
BP should continue to deploy one hydrophone (and one back-up unit) 1,476 ft (450 m) north of Northstar to monitor anthropogenic sounds from activities associated with the island.	BP will continue this practice under this final rule.
BP should continue to record the amount and type of activities at the island (i.e., crew boat trips, hovercraft trips, activities on the island, etc.). If activity levels change substantially, discussions of additional monitoring might be warranted.	BP will continue this practice under this final rule. Should additional monitoring be warranted, this would be discussed at the annual monitoring meeting between BP, NMFS, and the NSB.
Determine if additional monitoring (e.g., full acoustic array) might be needed if levels and types of activities at the island increase or whether BP's lower level of monitoring (or other data sets) suggests a change in whale behavior or distribution. If any of those events occur, BP should determine through discussions with NMFS and stake holders whether the full array should be deployed or some other monitoring technique implemented.	This recommendation repeats several previous recommendations. This topic would be included in the annual discussions between BP, NMFS, and the NSB.
Investigate the possibility of using existing acoustic data to monitor species other than bowhead whales. Also consider configuring hydrophones that would be deployed in the future to record at the higher frequencies and monitor other marine mammals in addition to bowheads.	Beginning with the 2011 data set, BP can document calls from species other than bowheads, but many other species do not call in the vicinity so the vocalizations would not be picked up by the array. BP will assess the possibility of recording at higher frequencies, but their ability to do so is limited by existing hardware.
Establish protocols for additional monitoring during autumn migratory seasons for bowheads when ''loud'' sounds are expected to be produced by Northstar activities. These protocols should be triggered when sounds might be produced and propagated to the migration corridor that are quieter than 180/190 dB (i.e., 160 or even 120 dB).	Should additional monitoring be warranted, this would be discussed at the annual monitoring meeting between BP, NMFS, and the NSB.
Develop an archive of (1) library of industrial sound sources with associated metadata, (2) raw acoustic recordings file, (3) summarized data (i.e., call counts, call types, etc.) from recordings, and (4) other monitoring data. Archived data will be especially important in the event of a large oil spill or other major impact. This archive should probably be maintained by a university or some other institution not associated with a government agency. The panel acknowledges BP's willingness to share data.	BP has provided archived data to the NSB and others in the past and will continue to do so.
Assess Northstar's impacts from a cumulative perspective. Each company's monitoring efforts, including BP's, should fit into a larger more comprehensive monitoring program with the objective of assessing cumulative impacts. This is one of the reasons that monitoring data should be archived.	Although not specifically linked to this monitoring plan, BP has undertaken cumulative effects methods development using an expert panel approach. The method is currently being ''truthed'' using data collected in 2008, including Northstar data.

TABLE 1—RECOMMENDATIONS FROM THE 2011 BP PEER REVIEW PANEL THAT WILL BE CARRIED OUT AND/OR INCORPORATED INTO BP'S MONITORING PLAN FOR THIS FINAL RULE—Continued

Panel recommendation	BP Response/commitment
Develop a plan for the periodic redeployment of a full array	BP will discuss this possibility at the annual monitoring planning meetings with NMFS and the NSB.

Reporting Measures

An annual report on marine mammal monitoring and mitigation will be submitted to NMFS, Office of Protected Resources, and NMFS, Alaska Regional Office, on June 1 of each year. The first report will cover the period from the effective date of the LOA through October 31, 2014. Subsequent reports will cover activities from November 1 of one year through October 31 of the following year. Ending each annual report on October 31 coincides with the end of the fall bowhead whale migration westward through the Beaufort Sea.

The annual reports will provide summaries of BP's Northstar activities. These summaries will include the following: (1) Dates and locations of ice-road construction; (2) on-ice activities; (3) vessel/hovercraft operations; (4) oil spills; (5) emergency training; and (6) major repair or maintenance activities that might alter the ambient sounds in a way that might have detectable effects on marine mammals, principally ringed seals and bowhead whales. The annual reports will also provide details of ringed seal and bowhead whale monitoring, the monitoring of Northstar sound via the nearshore DASAR (or similar recording device), descriptions of any observed reactions, and documentation concerning any apparent effects on accessibility of marine mammals to subsistence hunters. Based on a recommendation from the peer review panel, the annual reports should also include recorded calls of species other than bowhead whales (e.g., gray whales, bearded seals, etc.).

If specific mitigation and monitoring are required for activities on the sea ice initiated after March 1 (requiring searches with dogs for lairs), during the operation of strong sound sources (requiring visual observations and shutdown procedures), or for the use of new sound sources that have not previously been measured, then a preliminary summary of the activity, method of monitoring, and preliminary results will be submitted within 90 days after the cessation of that activity. The complete description of methods, results, and discussion will be submitted as part of the annual report.

In addition to annual reports, BP will submit a draft comprehensive report to NMFS, Office of Protected Resources, and NMFS, Alaska Regional Office, no later than 240 days prior to the expiration of these regulations. This comprehensive technical report will provide full documentation of methods, results, and interpretation of all monitoring during the first four and a quarter years of the LOA. Before acceptance by NMFS as a final comprehensive report, the draft comprehensive report will be subject to review and modification by NMFS scientists.

BP will notify NMFS within 24 hours if more than five ringed seals are killed annually as a result of the specified activity or if any other marine mammal species is injured, seriously injured or killed as a direct result of the specified activity at Northstar. Information that must be contained in the incident report submitted to NMFS includes: (1) Time, date, and location (latitude/longitude) of the incident; (2) the type of equipment involved in the incident; (3) description of the incident; (4) water depth, if relevant; (5) environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility); (6) species identification or description of the animal(s) involved; (7) the fate of the animal(s); and (8) photographs or video footage of the animal (if equipment is available). Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with BP to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. BP may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that BP discovers a dead or injured marine mammal and it is determined that the cause of the injury or death is either unknown or unrelated to the specified activities at Northstar, BP will provide documentation as noted in the previous paragraph to NMFS within 24 hours of the discovery. In these two instances, BP may continue to operate while NMFS reviews the circumstances of the incident. In addition to notifying the NMFS Office of Protected Resources and NMFS Alaska Regional Office, BP will also be required to contact the Alaska Regional Stranding Coordinators or the NMFS Alaska Stranding Hotline so that they can come and recover the animal if they choose to do so.

Adaptive Management

NMFS has included an adaptive management component in the regulations governing the take of marine mammals incidental to operation of the Northstar facility in the U.S. Beaufort Sea. In accordance with 50 CFR 216.105(c), regulations for the proposed activity must be based on the best available information. As new information is developed, through monitoring, reporting, or research, the regulations may be modified, in whole or in part, after notice and opportunity for public review. The use of adaptive management will allow NMFS to consider new information from different sources to determine if mitigation or monitoring measures should be modified (including additions or deletions) if new data suggest that such modifications are appropriate for subsequent LOAs.

The following are some of the possible sources of applicable data:

• Results from BP's monitoring from the previous year;

• Results from general marine mammal and sound research; or

• Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

In addition, LOAs shall be withdrawn or suspended if, after notice and opportunity for public comment, the Assistant Administrator finds, among other things, the regulations are not being substantially complied with or the taking allowed is having more than a negligible impact on the species or stock or an unmitigable adverse impact on the availability of marine mammal species or stocks for taking for subsistence uses, as allowed for in 50 CFR 216.106(e). That is, should monitoring and reporting show that operation of the Northstar facility is having more than a negligible impact on marine mammals or an unmitigable adverse impact on the availability of marine mammal species or stocks for taking for subsistence uses, then NMFS reserves the right to modify the regulations and/or withdraw or suspend an LOA after public review.

Previous Activities and Monitoring

The ''Background on the Northstar Development Facility'' section earlier in this document and in the proposed rule (76 FR 39706, July 6, 2011) discussed activities that have occurred at Northstar since construction began in the winter of 1999/2000. Activities that occurred at Northstar since 2006 include transportation (e.g., helicopter, hovercraft, tracked vehicles, and vessels), production activities (e.g., power generation, pipe driving, etc.), construction and maintenance activities, and monitoring programs.

Under previous MMPA ITAs, BP has been conducting marine mammal monitoring within the action area to satisfy monitoring requirements set forth in those authorizations. The monitoring programs have focused mainly on bowhead whales and ringed seals, as they are the two most common marine mammal species found in the Northstar Development area. Monitoring conducted by BP includes: (1) Underwater and in-air noise measurements; (2) monitoring of ringed seal lairs; (3) monitoring of hauled out ringed seals in the spring and summer months; and (4) acoustic monitoring of the bowhead whale migration. Additionally, although it was not a requirement of the regulations or associated LOAs, BP has also incorporated work done by Michael Galginaitis. Since 2001, Galginaitis has observed and characterized the fall bowhead whale hunts at Cross Island.

As required by the regulations and annual LOAs, BP has submitted annual reports, which describe the activities and monitoring that occurred at Northstar. BP also submitted a comprehensive report, covering the period 2005–2009. The comprehensive report concentrates on BP's Northstar activities and associated marine mammal and acoustic monitoring projects from 2005–2009. However, monitoring work prior to 2004 is summarized in that report, and activities in 2010 at Northstar were described as well. The annual and comprehensive reports are available on the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* A summary of the monitoring was provided in the ''Previous Activities and Monitoring'' section of the proposed rule (76 FR 39706, July 6, 2011). That information has not changed and is not repeated here. NMFS has determined that BP complied with the mitigation and monitoring requirements set forth in regulations and annual LOAs. In addition, NMFS has determined that the impacts on marine mammals and on the availability of marine mammals for subsistence uses from the activity fell within the nature and scope of those anticipated and authorized in the previous authorization (supporting the analysis in the current authorization).

Comments and Responses

On July 6, 2011 (76 FR 39706), NMFS published a proposed rule in response to BP's request to take marine mammals incidental to operation of offshore oil and gas facilities in the U.S. Beaufort Sea, Alaska, and requested comments, information, and suggestions concerning the request. During the 30-day public comment period, NMFS received comments from one private individual and the Marine Mammal Commission (MMC). NMFS has responded to these comments here.

Comment 1: The private citizen letter supported issuance of the authorization.

Response: NMFS has issued the requested authorization.

Comment 2: Regarding the estimated take of beluga whales, the MMC notes that some of the assumptions used to estimate take were based on data from peer-reviewed literature while other assumptions had no reasoned explanation. As such, the MMC does not believe that the information used to calculate the estimated number of takes of beluga whales was explained sufficiently or was scientifically sound. Additionally, the estimated number of takes of beluga whales included in Table 4 of the proposed rule preamble is inconsistent with the number in section 217.142 of the proposed rule. To address both of these concerns, the MMC recommends that NMFS require BP to provide a reasoned justification for the requested number of takes of beluga whales during the open-water season and ensure that the resulting take estimate is reflected accurately in section 217.142 of the regulations.

Response: In developing the estimated take of beluga whales, BP used monitoring data collected before construction of Northstar commenced. BP used Bowhead Whale Aerial Survey Program (BWASP, now referred to as the Aerial Surveys of Arctic Marine Mammals Project [ASAMM]) aerial survey data from 1979–2000 and LGL Limited aerial survey data from 1996–2000. Data from these two aerial survey programs note sightings throughout the Beaufort Sea. Therefore, assumptions needed to be made based on how many beluga whales might occur within the Level B harassment ensonified area around Northstar. Using data from BWASP and LGL surveys, it was noted that the majority of the beluga migration occurred far offshore of the Northstar development and that only 20% (and likely less) of the beluga population migrated closer into shore. The proposed rule used the 1992 estimate of the Beaufort Sea stock of beluga whales of 39,258 individuals. However, it is estimated that the stock has been increasing at a maximum annual rate of 4% (Hill and DeMaster, 1998; Angliss and Allen, 2011). Assuming a continued 4% annual growth rate, the population size could be approximately 89,457 beluga whales in 2013. This estimate is a maximum value and does not include loss of animals due to subsistence harvest or natural mortality factors. Angliss and Allen (2011) consider the current annual rate of increase to be unknown, and thus, the population size in 2013 may be less than the estimated value. Therefore, the 1992 population estimate was used to derive the take estimate.

Because some of the assumptions about percentage of individuals likely to be present in the area were not based on peer-reviewed literature and instead were based on scientific conjecture, it has been determined that it is more reasonable to estimate take of beluga whales based on the aerial survey data regarding sightings of belugas in the area. BWASP data from 2006–2009 note very few sightings of belugas in the survey block that encompasses Northstar (Clarke *et al.,* 2011a,b). Only six individuals were sighted in Block 1 in 2006, and groups of 1–20 individuals were sighted closer to shore in September 2007 with sightings in Block 1 occurring east of Northstar (Clarke *et al.,* 2011a). In 2010 and 2011, there were no sightings of belugas in the survey block closest to Northstar (Block 1; Clarke *et al.,* 2011c, 2012). However, some sightings occurred in Block 2, which is the next block offshore from Northstar. The 2012 ASAMM report indicates a small number of beluga whale sightings in Block 1 (maximum of three individuals in one sighting) with more sightings occurring in Block 2 (Clarke *et al.,* 2013). Based on this information, the sighting rates noted prior to Northstar construction, and average group size, it is estimated that 20 beluga whales would be taken by Level B harassment annually during the open-water season. The inconsistency in take estimates between the preamble and regulatory text has been corrected.

Comment 3: The MMC notes that BP's application did not specify Level A and B harassment zones for each of its proposed activities. Instead, it indicated that it would (1) shut down activities if a marine mammal was within the respective in-water Level A harassment zone for impulsive sources and (2) conduct acoustic measurements for any novel sound sources that produce in-air sounds of 90 dB re 20 μPa (rms) or greater. The MMC notes their appreciation for BP's measurements of in-water and in-air sound sources to date. However, it is not clear that all sound sources have been identified and that BP has in place reasonable plans to monitor their impacts. To ensure that sound propagation from all important sources is measured and appropriate harassment zones are established, the MMC recommends that NMFS: (1) require BP to identify all untested or novel impulsive and continuous sound sources; (2) work with BP to determine activity- and site-specific in-air and in-water Level A and B harassment zones for all those sources (including using the 120-dB re 1 μPa (rms) threshold for continuous sources); and (3) require BP to monitor those zones during all operations of the various sound sources and report its findings.

Response: As noted earlier in this document, activities anticipated to occur during the period of this final rule (i.e., January 2014–January 2019) are a continuation of activities that have been occurring for several years. Therefore, acoustic measurements have been made for the majority of sound sources to be used during activities occurring under these regulations. In its MMPA authorization request, BP noted all sound sources that are reasonably likely to be used during the course of the next 5 years of operation. However, there could be an unforeseen repair that may require use of a device not previously anticipated. At such time that the sound source is identified, BP is required (by these regulations) to conduct acoustic measurements on that source.

NMFS has established in-water acoustic thresholds that identify the received sound levels above which hearing impairment or other injury could potentially occur, which are 180 and 190 dB re 1 μPa (rms) for cetaceans and pinnipeds, respectively (NMFS, 1995, 2000). As identified in BP's monitoring plan and required in these final regulations, to prevent or at least minimize exposure to sound levels that might cause hearing impairment, exclusion zones will be established and monitored for the presence of seals and whales for activities that will produce impulsive sounds above these levels.

NMFS has not established in-air acoustic thresholds identifying received sound levels above which hearing impairment or other injury could potentially occur. Southall *et al.* (2007) propose that devices producing single or multiple pulse or nonpulse sounds may cause injury at SPLs at or above 149 dB re 20 μPa (rms). Table 5 in BP's application identifies sound levels of several commonly used devices on Northstar Island. In-air broadband sounds were found to be between approximately 65 and 81 dB re 20 μPa. Southall *et al.* (2007) reference Blackwell *et al.* (2004b) where reactions of ringed seals to pipe-driving were noted. The authors noted that there were no observable responses or brief orientation responses to in-air received levels of 60–80 dB re 20 μPa. Based on this information, only minor Level B behavioral harassment responses are anticipated from any of the in-air sounds produced on the island.

For more than a decade, BP has implemented an extensive acoustic monitoring program to measure sounds produced by the island's activities and to record calls of bowhead whales migrating westward through the Beaufort Sea in the fall. In-water sound levels from continuous sources often fell to 120–140 dB re 1 μPa (rms) within 1.2–2.5 mi (2–4 km) of the island. Because most cetaceans migrate farther offshore, many of them will occur outside the area ensonified to Level B harassment thresholds. BP will continue to conduct an acoustic monitoring program under these final regulations, as well as its summer visual monitoring program of hauled out seals. In the case of activities that will introduce impulsive sounds into the marine environment above 180 dB re 1 μPa (rms), BP is required to employ trained biological visual observers to watch for marine mammals. NMFS has determined that the protocols BP currently has in place and as required by these final regulations are sufficient to accurately record sounds produced by island activities and for implementing appropriate mitigation and monitoring procedures.

Comment 4: The MMC recommends that NMFS require BP to use ramp-up, shutdown, and power-down procedures with all activities that require establishment of harassment zones based on either impulsive or continuous noise, whether in-air or in-water.

Response: Currently, the only types of activities that would likely require the establishment of 180– and 190–dB re 1 μPa (rms) exclusion zones are impact hammering activities. BP proposed in their application (and NMFS has required in these final regulations) the implementation of shutdown and power-down procedures if marine mammals enter into the respective exclusion zones. The wording in the proposed rule (i.e., ''. . . reduce its SPL sufficiently to ensure that received SPLs do not exceed those prescribed SPL intensities at the affected marine mammal'') may have led to some confusion about whether or not a power-down would be required. This language was meant to convey the same requirement included in other authorizations that require an operator to reduce the sound output from a source to ensure that a marine mammal would not enter into the exclusion zone. If a power-down is insufficient to reduce the SPL to a level where the animal would not be ensonified to those levels, then a full shutdown is required.

Per the MMC's recommendation, NMFS has added the requirement for a ramp-up technique in the case of impact hammering activities to this final rule. A ramp-up technique shall be used at the beginning of each day's in-water pile driving activities and if pile driving resumes after it has ceased for more than 1 hour. If a vibratory driver is used, BP is required to initiate sound from vibratory hammers for 15 seconds at reduced energy followed by a 1-minute waiting period. The procedure shall be repeated two additional times before full energy may be achieved. If a non-diesel impact hammer is used, BP is required to provide an initial set of strikes from the impact hammer at reduced energy, followed by a 1-minute waiting period, then two subsequent sets. If a diesel impact hammer is used, BP is required to turn on the sound attenuation device for 15 seconds prior to initiating pile driving.

None of BP's activities would require implementation of ramp-up, shutdown, or power-down procedures based on in-air thresholds; therefore, none are required in the final rule.

Comment 5: The MMC recommends that NMFS require BP to conduct monitoring for 30 minutes before, during, and after all in-water activities that use impulsive or continuous sources (e.g., pile driving, pile removal, drilling, etc.). Such monitoring should contribute to a dataset that can be used to inform decisions regarding similar activities in the future.

Response: As noted in the MMC letter, monitoring for 30 minutes prior to initiation of the activity and during the activity was contained in BP's application and the proposed rule. This protocol is contained in this final rule. However, there was no mention of monitoring for up to 30 minutes after the cessation of such activities in BP's application or the proposed rule. NMFS has added such a requirement to the final rule. Therefore, under this final rule, BP is required to conduct monitoring for 30 minutes before, during, and after all in-water activities that use impulsive or continuous sources (e.g., pile driving, pile removal, drilling, etc.). The data collected by BP during these monitoring efforts will be used by NMFS to inform future decisions regarding similar activities.

Comment 6: The MMC commends BP for its commitment to conducting nearshore and offshore passive acoustic monitoring to assess bowhead whale calls during migration and recommends that NMFS work with BP to continue its monitoring, analysis, and reporting of the acoustic data BP collects on the occurrence, abundance, distribution, and movement of bowhead whales for periods before, during, and after all of the proposed activities (especially the use of vibratory or impact hammers and transiting of the vessels). The MMC also encourages BP to report data collected from any other vocalizing cetacean.

Response: As noted in BP's application and in the proposed rule, BP attempts to limit repairs requiring the use of vibratory or impact hammers during the ice-covered season or break-up period when cetaceans are not present in the area. Acoustic recorders are only deployed for approximately 30 days each year during the fall bowhead whale migration westward through the Beaufort Sea. It is logistically impracticable to deploy acoustic recorders during the ice-covered season. Therefore, the recorders are deployed at times when cetaceans most commonly occur in the area, which is during the open-water season and sometimes during the break-up period. If vibratory or impact hammering activities or vessel transits occur during this time period, then the acoustic monitoring will be in place. BP has agreed to begin reporting recorded vocalizations of other cetacean species (see Table 1 in the ''*Monitoring Plan Peer Review''* section earlier in this document). However, it is unlikely that many gray or beluga whale calls will be detected. Gray whales are infrequent callers and are not commonly encountered near Northstar. Belugas tend to occur well to the north of Northstar and call at frequencies that are unlikely to carry to the location of the array or to be detectable within the current recording bandwidth of BP's recorders. BP will assess the possibility of recording at higher frequencies, but their ability to do so is limited by existing hardware.

Comment 7: The peer-review panel at the 2011 Open-Water meeting suggested that the oil and gas industry investigate methods of far-field monitoring that do not require visual observers (i.e., unmanned aircraft). The panel also noted that other new technologies (i.e., unmanned underwater vehicles) could be used to provide far-field monitoring. The MMC believes that those technologies offer feasible monitoring techniques for future industry activities, but that legal constraints on using them (e.g., Federal Aviation Administration [FAA] requirements) have yet to be addressed. To further improve mitigation and monitoring methods, the MMC recommends that NMFS work with BP and other industry operators to: (1) evaluate the potential for using new technologies for mitigation and monitoring purposes; and (2) when and as appropriate, consult with the FAA and other responsible agencies to (a) clarify existing constraints on the use of such technology and (b) devise methods to implement the new technologies within those constraints.

Response: NMFS concurs that monitoring techniques are constantly evolving, especially in the Arctic. As appropriate, NMFS will work with BP and other industry operators to evaluate the potential for using new technologies for mitigation and monitoring purposes. If after those discussions it is determined that certain techniques should be pursued further, NMFS will consult with the FAA and other responsible agencies to clarify existing constraints on the use of such technology and devise methods to implement the new technologies within those constraints.

Comment 8: The MMC states that BP and NMFS are too dismissive of the probability of a major oil spill occurring and the risks to marine mammals. The MMC notes that the risk of an oil spill is not simply a function of its probability of occurrence; it also must take into account the consequences if such a spill occurs. Those consequences are, in part, a function of the spill's characteristics and the ability of the industry and government to mount an effective response. The MMC states: ''The assertion that BP would be able to respond adequately to any kind of major spill is simply unsupported by all the available evidence.''

Response: The proposed rule (76 FR 39706, July 6, 2011) described design features, as well as routine inspections and maintenance conducted by BP to minimize the likelihood of a major oil spill occurring at Northstar Island. Additionally, emergency and oil spill response training occurs at various times throughout the year at Northstar. The proposed rule also contained an extensive discussion on the potential effects of oil to cetaceans and pinnipeds in the area and their habitat (see 76 FR 39722–39726 and 39728–39730, July 6, 2011). That discussion noted that in the unlikely event of an oil spill from the Northstar pipeline itself, flow through the line can be stopped, thus reducing the amount of oil that would be spilled into the marine environment, thus making the situation different from the April 2010 incident in the Gulf of Mexico. NMFS' EA for this action also contains an analysis of the potential effects of an oil spill on marine mammals, their habitats, and subsistence activities.

BP has produced oil from Northstar since October 2001. There have been no major oil spills at Northstar or in the marine environment since production began. BP's annual reports note all spills that occur on a yearly basis as a result of conducting oil production operations. Only small spill events have been noted. While spills of basic materials, such as hydraulic fluids and motor oil, occur annually, NMFS has no reason to believe that there will be a major spill from the Northstar facility. For example, the five reports noting activity and incidents at the facility from November 1, 2005, through October 31, 2010, all indicate that there were 91 reportable small spills (such as 0.25 gallons of hydraulic fluid, 3 gallons of power steering fluid, or other relatively small amounts of sewage, motor oil, hydraulic oil, sulfuric acid, etc.), three of which reached Beaufort water or ice. All material (for example, 0.03 gallons of hydraulic fluid) from these three spills was completely recovered, with no resulting impacts to marine mammals, their habitats, or subsistence uses of marine mammals. Based on BP's ability to clean up past material spills, NMFS believes that any future material spills will be quickly contained and cleaned up completely.

Comment 9: The MMC states that BP's current Oil Discharge Prevention and Contingency Plan (ODPCP) outlines several measures for preventing and responding to a spill, as summarized in the application. As a result of the Gulf of Mexico Deepwater Horizon oil spill, the Bureau of Ocean Energy Management (BOEM) recently issued revised requirements for new or previously submitted development and production plans. In accordance with those revised requirements, operators must demonstrate adequate planning and preparation to ensure that oil and gas activity on the Outer Continental Shelf conforms with all applicable federal laws and regulations, is safe, conforms to sound conservation practices and does not cause undue or serious harm or damage to the human, marine or coastal environment (30 CFR 250.202). It also requires operators to revise blowout and worst-case discharge scenarios (Notice to Lessees NTL 2010–

N06) and to obtain additional resources and capabilities to help them avoid a major oil spill or respond if such a spill occurs. To clarify its existing response capabilities, BP should provide a realistic review and demonstration of its response capabilities (e.g., in-situ burning and mechanical recovery) and update its response plans based on lessons learned from the Deepwater Horizon oil spill and the conditions likely to be encountered in the Beaufort Sea.

The MMC understands that BP has submitted a revised ODPCP to the BOEM and that it has yet to be approved. For such purposes, NMFS should work closely with BOEM to ensure that oil and gas operations are safe. Given that BOEM, the state of Alaska, and the U.S. Coast Guard have yet to approve the plan, it is not clear how NMFS can decide that the plan is adequate. For that reason, the MMC recommends that NMFS review BP's revised ODPCP to determine whether the plan is adequate for preventing and responding to a major oil spill, convey the findings of this determination to BOEM, include a full description of response capabilities in the final rule, and incorporate sufficient mitigation measures into that rule to address response capabilities, thereby minimizing the likelihood of spill-related serious injury to or mortality of marine mammals and other wildlife and prevent serious degradation of the marine environment.

Response: At the proposed rule stage, staff from NOAA's Office of Response and Restoration reviewed BP's oil spill prevention and response measures and capabilities and determined that the likelihood of a major uncontrolled well blow-out incident is small. Moreover, that review indicated that BP continues to implement appropriate prevention protocols and utilize the best available technology in the event of a major well blow-out incident. BP's revised plan was again submitted to NOAA's Office of Response and Restoration. Based on that review, Office of Response and Restoration staff determined that BP understands and addresses the complexity involved in responding to potential oil spills at Northstar and that BP has adequately accounted for different scenarios in order to deal successfully with the various types of spills that could occur. While the review revealed some areas of the application that would warrant revised trajectory analysis, the reviewers determined that BP's ODPCP sufficiently and accurately analyzes the scope and oil spill response strategies for the Northstar oil production facility.

Department of the Interior's BSEE is the Federal agency with jurisdiction over determining the sufficiency of pollution prevention measures relating to offshore oil and gas operations. BSEE reviews the plan to ensure that identified measures are in keeping with applicable Federal regulations found in 30 CFR 250 Subpart C and industry standards. Federal agencies are able to provide input regarding mitigation measures through updates of the North Slope Subarea Contingency Plan, which is part of the Alaska Federal/State Preparedness Plan for Response to Oil and Hazardous Substance Discharges/Releases (May 2012). By regulation, industry is required to comply with the applicable standards established in these Area Contingency Plans. As a member of the Alaska Regional Response Team, NMFS was given a full opportunity to submit input to this document establishing requirements for mitigation for all offshore operators. BP has revised their plans to incorporate the lessons learned from the Deep Water Horizon event as well as the requirements contained in the relevant Notices to Lessees for calculating the worst-case discharge volume for the Northstar facility. BP's plan was also revised recently to respond to BSEE regulations relating to updated safety standards and practices. The Northstar ODPCP was made available for public and government comment during the State of Alaska renewal process which resulted in an approved plan by the State on February 10, 2012. BSEE's Oil Spill Response Division is in the process of completing its review of this plan and will ensure that all applicable regulations have been followed.

As noted earlier in this response to comment, experts in NOAA's Office of Response and Restoration reviewed the updated ODPCP. NOAA's comments and suggestions were shared with BSEE, as requested by the MMC. Those comments were considered by BSEE in its review of BP's ODPCP. BP's response capabilities were summarized in the proposed rule (76 FR 39706, July 6, 2011) and are described in greater detail in the ODPCP (available on the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*). NMFS assessed whether additional mitigation measures addressing response capabilities should be added to this final rule and determined that none were appropriate. Moreover, BP will conduct any needed oil spill response activities that occur in the vicinity of marine mammals in accordance with NOAA's Marine Mammal Oil Spill Response Guidelines, to the extent practicable.

Comment 10: The MMC recommends that NMFS condition the final rule to require BP to suspend its activities if more than five ringed seals are killed in any year, or any other marine mammal is seriously injured or killed and the injury or death could have been caused by those activities (e.g., a fresh carcass is found). NMFS should investigate any such incident to assess the cause and full impact (e.g., the types of injuries, the number of animals involved) and to determine what modifications in BP's activities are needed to avoid additional injuries or deaths. This will require that the appropriate investigators have timely access to the carcass(es), which will require that BP take steps to provide such access (e.g., by securing the carcass(es) and providing transport for investigators to the site). Full investigation of such incidents is necessary to provide information regarding the potential impact of Northstar's activities on marine mammals and to devise the means for avoiding such occurrences in the future.

Response: NMFS has added language to § 217.146 of this final rule requiring BP to notify NMFS within 24 hours if more than five ringed seals are killed annually as a result of the specified activity or if any other marine mammal species is injured, seriously injured or killed as a direct result of the specified activity at Northstar. The specific activity that resulted in the injury or death of the marine mammal will be halted until NMFS can review the circumstance of the incident and work with BP to modify operations, if it is deemed necessary. Information that must be contained in the incident report submitted to NMFS includes: (1) time, date, and location (latitude/longitude) of the incident; (2) the type of equipment involved in the incident; (3) description of the incident; (4) water depth, if relevant; (5) environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility); (6) species identification or description of the animal(s) involved; (7) the fate of the animal(s); and (8) photographs or video footage of the animal (if equipment is available). Activities shall not resume until NMFS is able to review the circumstances causing the exceedance of the authorized take. NMFS will work with BP to identify additional measures to minimize the likelihood that more than five ringed seals will not be killed each year (or other marine mammal species that may have been injured, seriously injured, or killed) from BP's activities. BP may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that BP discovers a dead or injured marine mammal and it is determined that the cause of the injury or death is either unknown or unrelated to the specified activities at Northstar, BP will provide documentation as noted in the previous paragraph to NMFS within 24 hours of the discovery. In these two instances, BP may continue to operate while NMFS reviews the circumstances of the incident. In addition to notifying the NMFS Office of Protected Resources and NMFS Alaska Regional Office, BP will also be required to contact the Alaska Regional Stranding Coordinators or the NMFS Alaska Stranding Hotline so that they can come and recover the animal if they choose to do so.

Estimated Take of Marine Mammals

One of the main purposes of NMFS' effects assessments is to identify the permissible methods of taking, which involves an assessment of the following criteria: the nature of the take (e.g., resulting from anthropogenic noise vs. from ice road construction, etc.); the regulatory level of take (i.e., mortality vs. Level A or Level B harassment); and the amount of take. In the ''Potential Effects of the Specified Activity on Marine Mammals'' section of the proposed rule (76 FR 39706, July 6, 2011), NMFS identified the different types of effects that could potentially result from activities at BP's Northstar facility.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].'' Take by Level B harassment is anticipated from operational sounds extending into the open-water migration paths of cetaceans and open-water areas where pinnipeds might be present, from the physical presence of personnel on the island, vehicle traffic, and by helicopter overflights. Take of hauled out pinnipeds, by harassment, could also occur as a result of in-air sound sources. Certain species may have a behavioral reaction to the sound emitted during the activities; however, hearing impairment as a result of these activities is not anticipated because of the low source levels for much of the equipment that is used. There is also a potential for take by injury or mortality of ringed seals from ice road construction activities. Because of the slow speed of hovercraft and vessels used for Northstar operations, it is highly unlikely that there would be any take from these activities.

Because BP operates the Northstar facility year-round, take of marine mammals could occur at any time of year. However, take of all marine mammal species that could potentially occur in the area is not anticipated during all seasons. This is because of the distribution and habitat preferences of certain species during certain times of the year. BP provided a full description of the methodology used to estimate takes in its application (see **ADDRESSES**), which is also provided in the proposed rule (76 FR 39706, July 6, 2011). Please refer to those documents for the full explanation, as only a short summary is provided here. As noted earlier in this document, there was a slight change to the method for calculating the take of beluga whales during the open-water season. That is explained further in this section.

Estimated Takes in the Ice-Covered Season

Potential sources of disturbance to marine mammals from the Northstar project during the ice-covered period consist primarily of vehicle traffic along the ice-road, helicopter traffic, and the ongoing production and drilling operations on the island. During the ice-covered season, the ringed seal is the only marine mammal that occurs regularly in the area of landfast ice surrounding Northstar. Spotted seals do not occur in the Beaufort Sea in the ice-covered season. Small numbers of bearded seals occur occasionally in the landfast ice in some years. Bowhead and beluga whales are absent from the Beaufort Sea in winter (or at least from the landfast ice portions of the Beaufort Sea), and in spring their eastward migrations are through offshore areas north of the landfast ice, which excludes whales from areas close to Northstar. Gray whales are also absent from this part of the Beaufort Sea during the ice-covered season. Therefore, takes of marine mammals during the ice-covered season were only estimated for ringed and bearded seals.

Potential displacement of ringed seals was more closely related to physical alteration of sea ice by industry than to exposure to detectable levels of low-frequency industrial sound during winter and spring (Williams *et al.,* 2006; Richardson *et al.,* 2008b; Moulton *et al.,* MS). The distance within which displacement of ringed seals might occur near a development like Northstar was defined as the physically affected area plus a 328 ft (100 m) buffer zone. A study from a drill site in the Canadian Beaufort Sea provided similar results (Harwood *et al.,* 2007). The Northstar ice road is typically flooded and thickened and/or cleared of snow. The physically affected ice road area is about 1,312 ft (400 m) wide, and this is extended with 328 ft (100 m) on either side to a total width of 1,969 ft (600 m) to derive the zone of displacement. This zone of displacement (or impact zone) around physically affected areas such as the ice road, work areas on the ice, and Northstar Island itself, is used to calculate the number of seals potentially affected (Richardson *et al.,* 2008b).

(1) Bearded Seal

The few bearded seals that remain in the area during winter and spring are generally found north of Northstar in association with the pack ice or the edge of the landfast ice. Based on available data, and the ecology of bearded seals, it is unlikely that more than a few bearded seals (and most likely none) will be present in close proximity (<328 ft [100 m]) to the ice road and Northstar itself during the ice-covered season. The most probable number of bearded seals predicted to be potentially impacted by Northstar activities during the ice-covered season in any one year is zero. However, to allow for unexpected circumstances that might lead to take of bearded seals when they are present, BP requested take of two bearded seals per year during the ice-covered period by Level B harassment.

(2) Ringed Seal

Individual ringed seals in the Northstar area during the ice-covered season may be displaced a short distance away from the ice road corridors connecting the production islands to the mainland. Seal monitoring each spring since 2005, based on visual observations from the Northstar module in the May 15–July 15 period, has shown continued occurrence of ringed seals near Northstar facilities, though with large variations within and between years (Aerts, 2009). During most of the year, all age and sex classes, except for newborn pups, could occur in the Northstar area. Ringed seals give birth in late March and April; therefore, at that time of year young pups may also be encountered.

Detailed monitoring of ringed seals near Northstar was done during spring and (in some years) winter of 1997 to 2002, including three years of Northstar construction and initial oil production

(2000–2002). BP estimated annual takes of ringed seal based on data collected from the intensive aerial monitoring program conducted in 1997–2002, using a series of steps outlined in BP's MMPA application and the proposed rule. Those results indicate that 3–8 seals could be present in the potential impact zone (Table 3 in BP's application). To allow for unexpected circumstances that might lead to take of ringed seals, BP requested take of eight ringed seals per year during the ice-covered period by Level B harassment. In the unlikely event that a ringed seal lair is crushed or flooded, BP also requested take of up to five ringed seals (including pups) by injury or mortality per year.

Estimated Takes in the Break-up Season

Potential sources of disturbance to marine mammals from the Northstar project during the break-up period consist primarily of hovercraft and helicopter traffic, as well as the ongoing production and drilling operations on the island. Spotted seals and bowhead, gray, and beluga whales are expected to be absent from the Northstar project area during the break-up period. Therefore, take of those species during the break-up period was not estimated.

Similar to the ice-covered season, BP predicts that only very few bearded seals (and most likely none) could be present within the potential impact zone around the ice road and Northstar facilities during the break-up period. The most probable number of bearded seals predicted to be potentially impacted by Northstar activities during break-up in any one year is zero. However, to account for the possible presence of low numbers of bearded seals during this time, NMFS has authorized the take of two bearded seals per year during the break-up season.

Impacts to ringed seals from Northstar activities during the break-up period are anticipated to be similar to those predicted during the ice-covered period. Additionally, the number of ringed seals present within the potential impact zone during the break-up period is expected to be similar to the number present during the ice-covered season. It is possible that some of these seals are the same individuals already counted as present during the latter stages of the ice-covered season (B. Kelly, pers. comm.). Thus, if any seals were affected during break-up, it is probable that some of these would be the same individuals. BP states that the requested Level B take of eight ringed seals per year during the ice-covered periods of 2014–2019 is expected to also cover potentially affected seals during break-up. However, in case the same seals are taken during both periods, NMFS has authorized the take of eight ringed seals per year by Level B harassment during the break-up period.

Estimated Takes in the Open-Water Season

Potential sources of disturbance to marine mammals from the Northstar project during the open-water period consist primarily of hovercraft and ACS vessels used for transfers of crew and supplies, barge and tugboat traffic, helicopter traffic, and the ongoing production and drilling operations on the island. During the open-water season, all six species can potentially be present in the Northstar area. Estimated annual numbers of potential open-water takes for each of these six species are summarized next.

(1) Spotted Seal

Pupping and mating occur in the spring when spotted seals are not in the Beaufort Sea. Hence, young pups would not be encountered in the Northstar Development area. All other sex and age classes may be encountered in small numbers during late summer/autumn. Spotted seals are most often found in waters adjacent to river deltas during the open-water season in the Beaufort Sea, and major haul-out concentrations are absent close to the project area. A small number of spotted seal haul-outs are (or were) located in the central Beaufort Sea in the deltas of the Colville River (which is more than 50 mi [80 km] from Northstar) and, previously, the Sagavanirktok River. No spotted seals were positively identified during BP's Northstar marine mammal monitoring activities, although a few spotted seals might have been present. A total of 12 spotted seals were positively identified near the source vessel during open-water seismic programs in the central Alaskan Beaufort Sea generally near Northstar from 1996 to 2001 (Moulton and Lawson, 2002). Numbers seen per year ranged from zero (in 1998 and 2000) to four (in 1999). To account for the possibility that spotted seals could occur in small numbers in the proximity of Northstar, NMFS has authorized the take of five spotted seals per year during the open-water period by Level B harassment.

(2) Bearded Seal

During the open-water season, bearded seals are widely and sparsely distributed in areas of pack ice and open water, including some individuals in relatively shallow water as far south as Northstar. Studies indicate that pups and other young bearded seals up to 3 years of age comprise 40–45% of the population (Nelson *et al.,* n.d.), and that younger animals tend to occur closer to shore. Therefore, although all age and sex classes could be encountered, bearded seals encountered in the Northstar project area during the open-water period are likely to be young, non-reproductive animals. Bearded seals, if present, may be exposed to noise and other stimuli from production activities and vessel and aircraft traffic on and around the island. To allow for unexpected circumstances, BP requested the take of one bearded seal per year during the open-water period.

(3) Ringed Seal

Because ringed seals are resident in the Beaufort Sea, they are the most abundant and most frequently encountered seal species in the Northstar area. During the open-water period, all sex and age classes (except neonates) could potentially be encountered. BP used a series of steps and assumptions to estimate the number of seals that potentially might be harassed by noise from Northstar production activities or from vessel and aircraft traffic, which is explained in BP's MMPA application and the proposed rule. Based on those assumptions, BP estimated that 15 ringed seals might be present and potentially affected during the open-water season.

(4) Bowhead Whale

Bowhead whales are not resident in the region of activity. During the open-water season, relatively few westward migrating bowheads occur within 6.2 mi (10 km) of Northstar during most years. However, in some years (especially years with relatively low ice cover) a larger percentage of the bowhead population migrates within 6.2–9.3 mi (10–15 km) of Northstar (Treacy, 1998; Blackwell *et al.,* 2007, 2009). The bowhead whale population in the Bering-Chukchi-Beaufort area was estimated to include approximately 10,545 animals (CV=0.128) in 2001. To estimate the 2013 population size for purposes of calculating potential ''takes'', the annual rate of increase was assumed to be steady at 3.4% (George *et al.,* 2004). Based on these figures, the 2013 population size could be approximately 15,750 bowhead whales.

There are few data on the age and sex composition of bowhead whales that have been sighted near the Prudhoe Bay area. The little available data from the area and more extensive data from more easterly parts of the Alaskan Beaufort Sea in late summer/autumn (Koski and Johnson, 1987; Koski and Miller, 2002, 2009) suggest that almost all age and sex categories of bowheads could be encountered, i.e., males, non-pregnant females, pregnant females, and calves (mostly 3–6 months old). Newly born calves (<1 month old) are not likely to be encountered during the fall (Nerini *et al.,* 1984; Koski *et al.,* 1993). The potential take of bowhead whales from Northstar activities would be limited to Level B harassment (including avoidance reactions and other behavioral changes). Most bowheads that could be encountered would be migrating, so it is unlikely that an individual bowhead would be harassed more than once.

Based on the amount of time bowhead whales are expected to be present in the general vicinity of the Northstar Development area and the fact that most of the whales migrate past the area beyond the 120-dB sound isopleths (NMFS' threshold for Level B harassment from continuous sound sources), which typically extend out less than 1.24–2.5 mi (2–4 km) from the island, it is estimated that only a small number of bowhead whales will be taken by harassment each year as a result of BP's activities. Therefore, BP requested take of 15 bowhead whales per year during the open-water season by Level B harassment.

(5) Gray Whale

Gray whales are uncommon in the Prudhoe Bay area, with no more than a few sightings in summer or early autumn in any one year, and usually no sightings (Miller *et al.,* 1999; Treacy, 2000, 2002a,b). Small numbers of gray whales were sighted on several occasions in the central Alaskan Beaufort, e.g., in the Harrison Bay area (Miller *et al.,* 1999; Treacy, 2000), in the Camden Bay area (Christie *et al.,* 2009) and one single sighting near Northstar production island (Williams and Coltrane, 2002). Several single gray whales have been seen farther east in the Canadian Beaufort Sea (Rugh and Fraker, 1981; LGL Ltd., unpubl. data), indicating that small numbers must travel through the Alaskan Beaufort during some summers. No specific data on age or sex composition are available for the few gray whales that move east into the Beaufort Sea. All sex and age classes (including pregnant females) could be found, with the exception of calves less than 6 months of age.

Gray whales typically do not show avoidance of sources of continuous industrial sound unless the received broadband level exceeds approximately 120 dB re 1 μPa (Malme *et al.,* 1984, 1988; Richardson *et al.,* 1995b; Southall *et al.,* 2007). The broadband received level approximately 1,476 ft (450 m) seaward from Northstar did not exceeded 120 dB 1 μPa in the operational period 2004–2008 (95th percentiles), except when a vessel was passing close to Northstar or the acoustic recorders (maximum levels). To account for the possibility that a low number of gray whales could occur near Northstar, BP requested take of two gray whales per year during the open-water period by Level B harassment.

(6) Beluga Whale

The Beaufort Sea beluga population was estimated at 39,258 individuals in 1992, with a maximum annual rate of increase of 4% (Hill and DeMaster, 1998; Angliss and Allen, 2009). Assuming a continued 4% annual growth rate, the population size could be approximately 89,457 beluga whales in 2013. However, the 4% estimate is a maximum value and does not include loss of animals due to subsistence harvest or natural mortality factors. Angliss and Allen (2009) consider the current annual rate of increase to be unknown. Thus, the population size in 2013 may be less than the estimated value. Additionally, the southern edge of the main fall migration corridor is approximately 62 mi (100 km) north of the Northstar region. A few migrating belugas were observed in nearshore waters of the central Alaskan Beaufort Sea by aerial and vessel-based surveyors during seismic monitoring programs from 1996–2001 (LGL and Greeneridge, 1996a; Miller *et al.,* 1997, 1998b, 1999). Results from aerial surveys conducted in 2006–2008 during seismic and shallow hazard surveys in the Harrison Bay and Camden Bay area also show that the majority of belugas occur along the shelf break, although there were some observations in nearshore areas (Christie *et al.,* 2009). Vessel-based surveyors observed a group of three belugas in Foggy Island Bay in July 2008, during BP's Liberty seismic survey (Aerts *et al.,* 2008) and small groups of westward traveling belugas have occasionally been sighted around Northstar and Endicott, mostly in late July to early/mid-August (John K. Dorsett, Todd Winkel, BP, pers. comm.). Any potential take of these beluga whales in nearshore waters is expected to be limited to Level B harassment. Belugas from the Chukchi stock occur in the Alaskan Beaufort Sea in summer but are even less likely than the Beaufort stock to be encountered in the nearshore areas where sounds from Northstar will be audible.

The few animals involved could include all age and sex classes. Most of the few belugas that could be encountered would be engaged in migration, so it is unlikely that a given beluga would be repeatedly ''taken by harassment''.

As noted in the response to comments found earlier in this document (Comment 2), take of beluga whales has not been estimated the same way it was in the proposed rule. The new explanation is provided here. BWASP data from 2006–2009 note very few sightings of belugas in the survey block that encompasses Northstar (Clarke *et al.,* 2011a,b). Only six individuals were sighted in Block 1 in 2006, and groups of 1–20 individuals were sighted closer to shore in September 2007 with sightings in Block 1 occurring east of Northstar (Clarke *et al.,* 2011a). In 2010 and 2011, there were no sightings of belugas in the survey block closest to Northstar (Block 1; Clarke *et al.,* 2011c, 2012). However, some sightings occurred in Block 2, which is the next block offshore from Northstar. The 2012 ASAMM report indicates a small number of beluga whale sightings in Block 1 (maximum of three individuals in one sighting) with more sightings occurring in Block 2 (Clarke *et al.,* 2013). Based on this information, the sighting rates noted prior to Northstar construction, and average group size, it is estimated that 20 beluga whales would be taken by Level B harassment annually during the open-water season.

Summary of Authorized Take

BP requested and NMFS has authorized the take of six marine mammal species incidental to operational activities at the Northstar facility. However, because some of these species only occur in the Beaufort Sea on a seasonal basis, take of all six species has not been authorized for an entire year. BP broke out its take requests into three seasons: ice-covered season; break-up period; and open-water season. Ringed and bearded seals are the only species for which take was requested (and has been authorized) in all three seasons. Take of all six species was only requested and authorized for the open-water season. With the exception of the request for five ringed seal (including pups) takes by injury or mortality per year, all requested takes are by Level B harassment. Table 2 in this document summarizes the abundance, take estimates, and percent of population for the six species for which NMFS has authorized take.

TABLE 2—POPULATION ABUNDANCE ESTIMATES, TOTAL ANNUAL AUTHORIZED TAKE (WHEN COMBINING TAKES FROM THE ICE-COVERED, BREAK-UP, AND OPEN-WATER SEASONS), AND PERCENTAGE OF POPULATION THAT MAY BE TAKEN FOR THE POTENTIALLY AFFECTED SPECIES

Species	Abundance	Total annual authorized Level B take	Total annual authorized injury or mortality take	Percentage of stock or population
Ringed Seal	[1]~250,000	31	5	0.01
Bearded Seal	[1]155,000	5	0	<0.01
Spotted Seal	[1]141,479	5	0	<0.01
Bowhead Whale	[2]15,750	15	0	0.1
Beluga Whale	[1]39,258	20	0	0.05
Gray Whale	[1]19,126	2	0	0.01

[1] Abundance estimates in NMFS 2011 Alaska SAR (Allen and Angliss, 2012).
[2] Estimate from George *et al.* (2004) with an annual growth rate of 3.4%.

Because Prudhoe Bay (and the U.S. Beaufort Sea as a whole) represents only a small fraction of the Arctic basin where these animals occur, NMFS has determined that only small numbers of the marine mammal species or stocks in the area would be potentially affected by operation of the Northstar facility. The take estimates presented here do not take into consideration the mitigation and monitoring measures contained in the regulations and required in subsequent LOAs.

Negligible Impact and Small Numbers Analysis and Determination

NMFS typically includes our negligible impact and small numbers analyses and determinations under the same section heading of our **Federal Register** notices. Despite co-locating these terms, we acknowledge that negligible impact and small numbers are distinct standards under the MMPA and treat them as such. The analyses presented below do not conflate the two standards; instead, each standard has been considered independently and we have applied the relevant factors to inform our negligible impact and small numbers determinations.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) the number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

No injuries or mortalities are anticipated for bearded and spotted seals or for bowhead, beluga, and gray whales. There is the potential for a small number of injuries or mortalities to ringed seals (no more than five per year) as a result of ice road construction activities during the ice-covered season. These injuries or mortalities could occur if a ringed seal lair is crushed or flooded. Additionally, animals in the area are not anticipated to incur any hearing impairment (i.e., TTS, a Level B harassment, or permanent threshold shift, a Level A [injury] harassment), as acoustic measurements indicate source levels below 180 dB and 190 dB, which are the thresholds used by NMFS for acoustic injury to marine mammals. All other takes are anticipated to be by Level B behavioral harassment only. Certain species may have a behavioral reaction (e.g., increased swim speed, avoidance of the area, etc.) to the sound emitted during the operational activities. Table 2 in this document outlines the number of takes that are anticipated as a result of BP's activities. These takes are anticipated to be of low intensity due to the low level of sound emitted by the majority of the activities themselves. Activities occur at Northstar year-round, but the majority of these activities produce low-level continuous sounds. Only on rare occasions are more high-intensity pulsed sounds emitted into the surrounding environment. The ringed seal (and possibly the bearded seal) are the only species that occur in the area year-round.

Even though activities occur throughout the year, none of the cetacean species occur near Northstar all year. Cetaceans are most likely to occur in the late summer and autumn seasons. However, even during that time, much of the populations of those species migrate past the area farther offshore than the area where Northstar sounds can be heard. Spotted seals also tend to only be present in the open-water season. Moreover, they are more common in the Colville River Delta area, which is more than 50 mi (80 km) west of the Northstar Development area, than in the waters surrounding Northstar. Ringed and bearded seals could be found in the area year-round. However, many of them remain far enough from the facility, outside of areas where harassment is possible. Additionally, ringed seals have been observed in the area every year since the beginning of construction and into the subsequent operational years.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Even though activities occur on successive days at Northstar, none of the cetacean species (i.e., beluga, bowhead, and gray whales) are anticipated to incur impacts on successive days. In the vicinity of Northstar, bowheads and belugas are migrating through the area. Therefore, it is unlikely that the same animals are impacted on successive days. Acoustic data that have been collected off Northstar Island for more than a decade do not indicate that operations at the island are affecting the bowhead whale migrations through the Beaufort Sea. Although bowhead whales have been observed feeding in several locations throughout the central Beaufort Sea, most sightings have occurred more than 62 mi (100 km) from Northstar. Belugas that migrate through the U.S. Beaufort Sea typically do so farther offshore (more than 37 mi [60 km]) and in deeper waters (more than 656 ft [200 m]) than where Northstar activities occur. Gray whales are rarely sighted this far east in the U.S. Beaufort Sea. Additionally, there are no known feeding grounds for gray whales in the Prudhoe Bay area. The most northern feeding sites known for this species are located in the Chukchi Sea near Hanna Shoal and Point Barrow. Based on these factors, exposures of gray whales to industrial sounds are not expected to last for prolonged periods (i.e., several days or weeks) since they are not known to remain in the area for extended periods of time.

The same individual bearded and spotted seals are also not likely to occur in the project area on successive days. Individual ringed seals may occur in the project area on successive days. Ringed seals construct lairs for pupping in the Beaufort Sea in late winter/early spring on the landfast ice. As noted earlier in this document, BP is required to implement mitigation measures to avoid disturbing lairs and potentially crushing lairs occupied by ringed seals. Bearded seals breed in the Bering and Chukchi Seas, as the Beaufort Sea provides less suitable habitat for the species. Spotted seals are even less common in the Prudhoe Bay area, and the species does not breed in the Beaufort Sea. Monitoring results (which were discussed in the proposed rule) indicate that operation of the Northstar facility has not affected activities such as ice seal resting and pupping in the area. Additionally, pinnipeds appear to be more tolerant of anthropogenic sound, especially at lower received levels, than other marine mammals, such as mysticetes.

Of the six marine mammal species for which take is authorized, one is listed as endangered under the ESA—the bowhead whale—and two are listed as threatened—ringed and bearded seals. All three species are also considered depleted under the MMPA. As stated previously in this document, the affected bowhead whale stock has been increasing at a rate of 3.4% per year since 2001 (Allen and Angliss, 2012). There are currently no reliable data on trends of the ringed and bearded seal stocks in Alaska. Certain stocks or populations of gray and beluga whales and spotted seals are listed as endangered or are proposed for listing under the ESA; however, none of those stocks or populations occur in the activity area. There is currently no established critical habitat in the project area for any of these six species.

The population estimates for the species that may potentially be taken as a result of BP's activities were presented earlier in this document. For reasons described earlier in this document, the maximum calculated number of individual marine mammals for each species that could potentially be taken annually is small relative to the overall population sizes (less than 1% of each of the six populations or stocks).

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS has determined that operation of the BP Northstar facility will result in the incidental take of small numbers of marine mammals and that the total taking from BP's activities will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

Relevant Subsistence Uses

The disturbance and potential displacement of marine mammals by sounds from island production activities are the principal concerns related to subsistence use of the area. However, contamination of animals and traditional hunting areas by oil (in the unlikely event that a major oil spill did occur) is also a concern. Subsistence remains the basis for Alaska Native culture and community. Marine mammals are legally hunted in Alaskan waters by coastal Alaska Natives. In rural Alaska, subsistence activities are often central to many aspects of human existence, including patterns of family life, artistic expression, and community religious and celebratory activities. Additionally, the animals taken for subsistence provide a significant portion of the food that will last the community throughout the year. The main species that are hunted include bowhead and beluga whales, ringed, spotted, and bearded seals, walruses, and polar bears. (As mentioned previously in this document, both the walrus and the polar bear are under the USFWS' jurisdiction.) The importance of each of these species varies among the communities and is largely based on availability.

Residents of the village of Nuiqsut are the primary subsistence users in the project area. The communities of Barrow and Kaktovik also harvest resources that pass through the area of interest but do not hunt in or near the Northstar area. Subsistence hunters from all three communities conduct an annual hunt for autumn-migrating bowhead whales. Barrow also conducts a bowhead hunt in spring. Residents of all three communities hunt seals. Other subsistence activities include fishing, waterfowl and seaduck harvests, and hunting for walrus, beluga whales, polar bears, caribou, and moose. Relevant harvest data are summarized in Tables 8 and 9 in BP's application (see **ADDRESSES**).

Nuiqsut is the community closest to the Northstar development (approximately 54 mi [87 km] southwest from Northstar). Nuiqsut hunters harvest bowhead whales only during the fall whaling season (Long, 1996). In recent years, Nuiqsut whalers have typically landed three or four whales per year (see Table 9 in BP's application). Nuiqsut whalers concentrate their efforts on areas north and east of Cross Island, generally in water depths greater than 66 ft (20 m; Galginaitis, 2009). Cross Island is the principal base for Nuiqsut whalers while they are hunting bowheads (Long, 1996). Cross Island is located approximately 16.8 mi (27 km) east of Northstar.

Kaktovik whalers search for whales east, north, and occasionally west of Kaktovik. Kaktovik is located approximately 124 mi (200 km) east of Northstar Island. The western most reported harvest location was about 13 mi (21 km) west of Kaktovik, near 70°10' N., 144°11' W. (Kaleak, 1996). That site is about 112 mi (180 km) east of Northstar Island.

Barrow whalers search for whales much farther from the Northstar area—about 155+ mi (250+ km) to the west. However, given the westward migration of bowheads in autumn, Barrow (unlike Kaktovik) is ''downstream'' from the Northstar region during that season. Barrow hunters have expressed concern about the possibility that bowheads might be deflected offshore by Northstar and then remain offshore as they pass Barrow.

Beluga whales are not a prevailing subsistence resource in the communities of Kaktovik and Nuiqsut. Kaktovik hunters may harvest one beluga whale in conjunction with the bowhead hunt; however, it appears that most households obtain beluga through exchanges with other communities. Although Nuiqsut hunters have not hunted belugas for many years while on Cross Island for the fall hunt, this does not mean that they may not return to this practice in the future. Data presented by Braund and Kruse (2009) indicate that only one percent of Barrow's total harvest between 1962 and 1982 was of beluga whales and that it did not account for any of the harvested animals between 1987 and 1989.

Ringed seals are available to subsistence users in the Beaufort Sea year-round, but they are primarily hunted in the winter or spring due to the rich availability of other mammals in the summer. Bearded seals are primarily hunted during July in the Beaufort Sea; however, in 2007, bearded seals were harvested in the months of August and September at the mouth of the Colville River Delta, which is more than 50 mi (80 km) from Northstar. However, this sealing area can reach as far east as Pingok Island, which is approximately 17 mi (27 km) west of Northstar. An annual bearded seal harvest occurs in the vicinity of Thetis Island (which is a considerable distance from Northstar) in July through August. Approximately 20 bearded seals are harvested annually through this hunt. Spotted seals are harvested by some of the villages in the summer months. Nuiqsut hunters typically hunt spotted seals in the nearshore waters off the Colville River Delta. The majority of the more established seal hunts that occur in the Beaufort Sea, such as the Colville delta area hunts, are located a significant distance (in some instances 50 mi [80 km] or more) from the project area.

Potential Impacts to Subsistence Uses

NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as: ''. . . an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.''

Noise and general activity during BP's Northstar operations have the potential to impact marine mammals hunted by Native Alaskans. Additionally, if a major oil spill occurred (even though it is unlikely), there could be impacts to marine mammals hunted by Native Alaskans and to the hunts themselves. Although small spills happen annually, those spills are typically contained to the island and do not reach Beaufort Sea ice or water, thus there are no impacts to marine mammals or marine mammal hunts. In the case of cetaceans, the most common reaction to anthropogenic sounds (as noted in the proposed rule) is avoidance of the ensonified area. In the case of bowhead whales, this often means that the animals divert from their normal migratory path by several kilometers. Helicopter activity also has the potential to disturb cetaceans and pinnipeds by causing them to vacate the area. Additionally, general vessel presence in the vicinity of traditional hunting areas could negatively impact a hunt. Native knowledge indicates that bowhead whales become increasingly ''skittish'' in the presence of seismic noise. Whales are more wary around the hunters and tend to expose a much smaller portion of their back when surfacing (which makes harvesting more difficult). Additionally, natives report that bowheads exhibit angry behaviors in the presence of seismic, such as tail-slapping, which translate to danger for nearby subsistence harvesters.

In the case of subsistence hunts for bowhead whales in the Beaufort Sea, there could be an adverse impact on the hunt if the whales were deflected seaward (further from shore) in traditional hunting areas. The impact would be that whaling crews would have to travel greater distances to intercept westward migrating whales, thereby creating a safety hazard for whaling crews and/or limiting chances of successfully striking and landing bowheads.

Oil spills might affect the hunt for bowhead whales. The harvest period for bowhead whales is probably the time of greatest risk that a relatively large-scale spill would reduce the availability of bowhead whales for subsistence uses. Pipeline spills are possible for the total production period of Northstar. Spills could occur at any time of the year. However, spills at most times of year would not affect bowheads, as bowheads are present near Northstar for only several weeks during late summer and early autumn. Bowheads travel along migration corridors that are far offshore of the planned production islands and pipelines during spring and somewhat offshore of those facilities during autumn. Under the prevailing east-wind conditions, oil spills from Northstar would not move directly into the main hunting area east and north of Cross Island. However, large oil spills could extend into the hunting area under certain wind and current regimes (Anderson *et al.,* 1999). Small spills of items such as hydraulic fluid or diesel fuel are typically relegated to the island or ice roads and are successfully cleaned up before the material reaches areas where marine mammals could be present.

Even in the case of a major spill, it is unlikely that more than a small minority of the bowheads encountered by hunters would be contaminated by oil. However, disturbance associated with reconnaissance and cleanup activities could affect whales and thus accessibility of whales to hunters. In the very unlikely event that a major spill incident occurred during the relatively short fall whaling season, it is possible that hunting would be affected significantly.

Ringed seals are more likely than bowheads to be affected by spill incidents because they occur in the development areas throughout the year and are more likely than whales to occur close to Northstar. Small numbers of bearded seals could also be affected, especially by a spill during the open-water season. Potential effects on subsistence use of seals will still be relatively low, as the areas most likely to be affected are not areas heavily used for seal hunting. However, wind and currents could carry spilled oil west from Northstar to areas where seal hunting occurs. It is possible that oil-contaminated seals could be harvested.

Oil spill cleanup activity could exacerbate and increase disturbance effects on subsistence species, cause localized displacement of subsistence species, and alter or reduce access to those species by hunters. On the other hand, the displacement of marine mammals away from oil-contaminated areas by cleanup activities would reduce the likelihood of direct contact with oil and thus reduce the likelihood of tainting or other impacts on the mammals.

One of the most persistent effects of the Exxon Valdez oil spill (EVOS) was the reduced harvest and consumption of subsistence resources due to the local perception that they had been tainted by oil (Fall and Utermohle, 1995). The concentrations of petroleum-related aromatic compound (AC) metabolites in the bile of harbor seals were greatly elevated from oiled areas of Prince William Sound (PWS). Mean concentrations of phenanthrene equivalents for oiled seals from PWS were over 70 times greater than for control areas and over 20 times higher than for presumably unoiled areas of PWS (Frost *et al.,* 1994b). Concentrations of hydrocarbons in harbor seal tissues collected in PWS 1 year after EVOS were not significantly different from seals collected in non-oiled areas; however, average concentrations of AC metabolites in bile were still significantly higher than those observed in un-oiled areas (Frost *et al.,* 1994b). The pattern of reduced consumption of marine subsistence resources by the local population persisted for at least 1 year. Most affected communities had returned to documented pre-spill harvest levels by the third year after the spill. Even then, some households in these communities still reported that subsistence resources had not recovered to pre-spill levels. Harvest levels of subsistence resources for the three communities most affected by the spill still were below pre-spill averages even after 3 years. By then, the concern was mainly about smaller numbers of animals rather than contamination. However, contamination remained an important concern for some households (Fall and Utermohle, 1995). As an example, an elder stopped eating local salmon after the spill, even though salmon is the most important subsistence resource, and he ate it every day up to that point. Similar effects could be expected after a spill on the North Slope, with the extent of the decline in harvest and use, and the temporal duration of the effect, dependent upon the size and location of the spill. This analysis reflects the local perception that oil spills pose the greatest potential danger associated with offshore oil production.

Plan of Cooperation (POC)

Regulations at 50 CFR 216.104(a)(12) require MMPA authorization applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. BP and the Alaska Eskimo Whaling Commission (AEWC) established a conflict avoidance agreement to mitigate the noise and/or traffic impacts of offshore oil and gas production related activities on subsistence whaling. In addition, the NSB and residents from Barrow, Nuiqsut, and Kaktovik participated in the development of the Final Environmental Impact Statement (FEIS) for the Northstar project. Local residents provided traditional knowledge of the physical, biological, and human environment, which was incorporated into the Northstar FEIS. Also included in the Northstar FEIS is information gathered from the 1996 community data collection, along with relevant testimony during past public hearings in the communities of Barrow, Nuiqsut, and Kaktovik. This data collection has helped ensure that the concerns of NSB residents about marine mammals and subsistence are taken into account in the development of the project designs, permit stipulations, monitoring programs, and mitigation measures.

BP meets annually with communities on the North Slope to discuss the Northstar Development project. Stakeholder and peer review meetings convened by NMFS have been held at least annually from 1998 to the present to discuss proposed monitoring and mitigation plans, and results of completed monitoring and mitigation. Those meetings have included representatives of the concerned communities, the AEWC, the NSB, Federal, state, and university biologists, the MMC, and other interested parties. One function of those meetings has been to coordinate planned construction and operational activities with subsistence whaling activity. The agreements have and likely will address the following: operational agreement and communications procedures; when/where agreement becomes effective; general communications scheme, by season; Northstar Island operations, by season; conflict avoidance; seasonally sensitive areas; vessel navigation; air navigation; marine mammal and acoustic monitoring activities; measures to avoid impacts to marine mammals; measures to avoid impacts in areas of active whaling; emergency assistance; and dispute resolution process.

Most vessel and helicopter traffic will occur inshore of the bowhead migration corridor. BP does not often approach bowhead whales with these vessels or aircraft. Insofar as possible, BP will ensure that vessel traffic near areas of particular concern for whaling will be completed before the end of August, as the fall bowhead hunts in Kaktovik and Cross Island (Nuiqsut) typically begin around September 1 each year. Additionally, any approaches of bowhead whales by vessels or helicopters will not occur within the area where Nuiqsut hunters typically search for bowheads. Essential traffic to and from Northstar has been and will continue to be closely coordinated with the NSB and AEWC to avoid disruptions of subsistence activities. Unless limited by weather conditions, BP maintains a minimum flight altitude of 1,000 ft (305 m), except during takeoffs, landings, and emergency situations, and all helicopter transits occur in a specified corridor from the mainland.

Unmitigable Adverse Impact Analysis and Determination

NMFS has determined that BP's operation of the Northstar facility will not have an unmitigable adverse impact on the availability of marine mammal species or stocks for taking for subsistence uses. This determination is supported by the fact that BP works closely with the NSB, AEWC, and hunters of Nuiqsut to ensure that impacts are avoided or minimized during the annual fall bowhead whale hunt at Cross Island (the closest whale hunt to Northstar). Vessel and air traffic will be kept to a minimum during the bowhead hunt in order to keep from harassing the animals, which could possibly make them more difficult to hunt. To minimize the potential for conflicts with subsistence users, marine vessels transiting between Prudhoe Bay or West Dock and Northstar Island travel shoreward of the barrier islands as much as possible and avoid the Cross Island area during the bowhead hunting season in autumn. The fall hunt at Kaktovik occurs well to the east of Northstar (approximately 124 mi [200 km] away), so there should be no impacts to hunters within that community, since the whales will reach Kaktovik well before they enter areas that may be ensonified by activities at Northstar. Barrow is more than 155 mi (250 km) west of Northstar. Even though the whales will have to pass by Northstar before reaching Barrow for the fall hunt, the community is well beyond the range of detectable noise from Northstar. In the spring, the whales will reach Barrow before Northstar. Therefore, no impacts are anticipated on the spring bowhead whale hunt for the Barrow community.

Beluga whales are not a primary target of subsistence hunts by the Beaufort Sea communities. However, Nuiqsut whalers at Cross Island have been known to take a beluga in conjunction with the fall bowhead whale hunt. The reasons stated previously regarding no unmitigable adverse impact to bowhead hunting at Cross Island are also applicable to beluga hunts. Additionally, should Kaktovik or Barrow conduct a beluga hunt, the distance from Northstar of these two communities would ensure no unmitigable adverse impact to those hunts.

Subsistence hunts of ice seals can occur year-round in the Beaufort Sea. However, hunts do not typically occur in the direct vicinity of Northstar. Some of the more established seal hunts occur in areas more than 20–30 mi (32–48 km) from Northstar. It is not anticipated that there would be any impacts to the seals themselves that would make them unavailable to Native Alaskans. Additionally, no adverse effects to the hunters are anticipated to occur due to conflicts with them in traditional hunting grounds.

In the unlikely event of a major oil spill that spread into Beaufort Sea ice or water, there could be major impacts on the availability of marine mammals for subsistence uses. As discussed earlier in this document, the probability of a major oil spill occurring over the life of the project is low (S.L. Ross

Environmental Research Ltd., 1998). Additionally, BP developed an oil spill prevention and contingency response plan, which has been amended several times. The most recent revision has been approved by the State of Alaska and is pending approval by BSEE. BP also conducts routine inspections of and maintenance on the pipeline (as described in the proposed rule) to help reduce the likelihood of a major oil spill. To help with preparedness in the event of a major oil spill, BP conducts emergency and oil spill response training activities at various times throughout the year. Equipment and techniques used during oil spill response exercises are continually updated.

Based on the measures described in BP's POC, the required mitigation and monitoring measures (described earlier in this document), and the project design itself, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from BP's operation of the Northstar facility. Even though there could be unmitigable adverse impacts on subsistence uses from a major oil spill, because of the low probability of such an event occurring and the measures that BP implements to reduce the likelihood of a major oil spill, NMFS has determined that there will not be an unmitigable adverse impact to subsistence uses from an oil spill at Northstar.

Endangered Species Act (ESA)

On March 4, 1999, NMFS concluded consultation with the U.S. Army Corps of Engineers on permitting the construction and operation of the Northstar site. The finding of that consultation was that construction and operation at Northstar is not likely to jeopardize the continued existence of the bowhead whale. Since no critical habitat has been established for that species, the consultation also concluded that none would be affected.

Within the project area, the bowhead whale is listed as endangered and the ringed and bearded seals are listed as threatened under the ESA. Therefore, the NMFS Permits and Conservation Division conducted consultation with the NMFS Endangered Species Division on the issuance of regulations and subsequent LOAs under section 101(a)(5)(A) of the MMPA for this activity. In May, 2012, NMFS finished conducting its section 7 consultation and issued a Biological Opinion, and concluded that the issuance of regulations and subsequent LOAs associated with BP's operation of Northstar is not likely to jeopardize the continued existence of the endangered bowhead whale, the Arctic sub-species of ringed seal, or the Beringia distinct population segment of bearded seal. No critical habitat has been designated for these species, therefore none will be affected.

National Environmental Policy Act (NEPA)

On February 5, 1999 (64 FR 5789), the Environmental Protection Agency noted the availability for public review and comment of a FEIS prepared by the U.S. Army Corps of Engineers under NEPA on Beaufort Sea oil and gas development at Northstar. Based upon a review of the FEIS and comments received on the Draft and Final EIS, NMFS adopted the FEIS on May 18, 2000. Because of the age of the FEIS and the availability of new scientific information, NMFS conducted a new analysis, pursuant to NEPA, regarding the issuance of MMPA rulemaking and subsequent LOA(s) to BP for its operation of Northstar. In June 2012, NMFS released an EA and issued a FONSI for this action. NMFS determined that issuance of these regulations and subsequent LOAs would not significantly impact the quality of the human environment; therefore, preparation of an Environmental Impact Statement was not required for this action.

Classification

The Office of Management and Budget (OMB) has determined that this final rule is not significant for purposes of Executive Order 12866.

At the proposed rule stage, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. BP Exploration (Alaska) Inc. is the only entity that would be subject to the requirements in these proposed regulations. BP Exploration (Alaska) Inc. is an upstream strategic performance unit of the BP Group. Globally, BP ranks among the 10 largest oil companies. BP Exploration (Alaska) Inc. is one of Alaska's largest employers with nearly 2,000 employees, and, as of December 31, 2011, BP Group had more than 83,000 employees worldwide. Therefore, it is not a small governmental jurisdiction, small organization, or small business, as defined by the Regulatory Flexibility Act. No comments were received on the certification. Accordingly, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This final rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOAs, and reports.

List of Subjects in 50 CFR Part 217

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: December 5, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 217 is amended as follows:

PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Subpart O is added to part 217 to read as follows:

Subpart O—Taking of Marine Mammals Incidental to Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea

Sec.

217.140 Specified activity and specified geographical region.
217.141 Effective dates.
217.142 Permissible methods of taking.
217.143 Prohibitions.
217.144 Mitigation.
217.145 Measures to ensure availability of species for subsistence uses.
217.146 Requirements for monitoring and reporting.
217.147 Applications for Letters of Authorization.
217.148 Letters of Authorization.
217.149 Renewal of Letters of Authorization and adaptive management.
217.150 Modifications of Letters of Authorization.

Subpart O—Taking of Marine Mammals Incidental to Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea

§ 217.140 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to BP Exploration (Alaska) Inc. (BP) and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occurs incidental to operation of offshore oil and gas facilities in the U.S. Beaufort Sea, Alaska, in the Northstar Development Area.

(b) The taking of marine mammals by BP may be authorized in a Letter of Authorization only if it occurs in the geographic region that encompasses the Northstar Oil and Gas Development area within state and/or Federal waters in the U.S. Beaufort Sea.

§ 217.141 Effective dates.

Regulations in this subpart are effective from January 13, 2014 through January 14, 2019.

§ 217.142 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 217.148 of this chapter, the Holder of the Letter of Authorization (hereinafter ''BP'') may incidentally, but not intentionally, take marine mammals within the area described in § 217.140(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 217.140(a) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 217.140(a) is limited to the following species and by the indicated method and amount of take:

(1) Level B Harassment:

(i) Cetaceans:

(A) Bowhead whale (*Balaena mysticetus*)—75 (an average of 15 annually)

(B) Gray whale (*Eschrichtius robustus*)—10 (an average of 2 annually)

(C) Beluga whale (*Delphinapterus leucas*)—100 (an average of 20 annually)

(ii) Pinnipeds:

(A) Ringed seal (*Phoca hispida*)—155 (an average of 31 annually)

(B) Bearded seal (*Erignathus barbatus*)—25 (an average of 5 annually)

(C) Spotted seal (*Phoca largha*)—25 (an average of 5 annually)

(2) Level A Harassment and Mortality: Ringed seal—25 (an average of 5 annually)

§ 217.143 Prohibitions.

Notwithstanding takings contemplated in § 217.140 and authorized by a Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter, no person in connection with the activities described in § 217.140 may:

(a) Take any marine mammal not specified in § 217.142(c);

(b) Take any marine mammal specified in § 217.142(c) other than by incidental take as specified in § 217.142(c)(1) and (c)(2);

(c) Take a marine mammal specified in § 217.172(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal;

(d) Take a marine mammal specified in § 217.172(c) if such taking results in an unmitigable adverse impact on the species or stock for taking for subsistence uses; or

(e) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter.

§ 217.144 Mitigation.

(a) When conducting the activities identified in § 217.140(a), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter must be implemented. These mitigation measures include but are not limited to:

(1) Ice-covered Season:

(i) In order to reduce the taking of ringed seals to the lowest level practicable, BP must begin winter construction activities, principally ice roads, as soon as possible once weather and ice conditions permit such activity.

(ii) Any ice roads or other construction activities that are initiated after March 1, in previously undisturbed areas in waters deeper than 10 ft (3 m), must be surveyed, using trained dogs in order to identify and avoid ringed seal structures by a minimum of 492 ft (150 m).

(iii) After March 1 of each year, activities should avoid, to the greatest extent practicable, disturbance of any located seal structure.

(2) Open-water Season:

(i) BP will establish and monitor, during all daylight hours, a 190 dB re 1 μPa (rms) exclusion zone for seals around the island for all activities with sound pressure levels (SPLs) that are expected to exceed that level in waters beyond the Northstar facility on Seal Island.

(ii) BP will establish and monitor, during all daylight hours, a 180 dB re 1 μPa (rms) exclusion zone for cetaceans around the island for all activities with SPLs that are expected to exceed that level in waters beyond the Northstar facility at Seal Island.

(iii) If any marine mammals are observed within the relevant exclusion zone, described in § 217.144(a)(2)(i) or (a)(2)(ii), the activity creating the noise will shutdown or reduce its SPL sufficiently (i.e., power down) to ensure that received SPLs do not exceed those prescribed SPL intensities at the affected marine mammal. The shutdown or reduced SPL shall be maintained until such time as the observed marine mammal(s) has been seen to have left the applicable exclusion zone or until 15 minutes have elapsed in the case of a pinniped or odontocete or 30 minutes in the case of a mysticete without resighting, whichever occurs sooner.

(iv) The entire exclusion zones prescribed in § 217.144(a)(2)(i) or (a)(2)(ii) must be visible during the entire 30-minute pre-activity monitoring time period in order for the activity to begin.

(v) BP shall employ a ramp-up technique at the beginning of each day's in-water pile driving activities and if pile driving resumes after it has ceased for more than 1 hour.

(A) If a vibratory driver is used, BP is required to initiate sound from vibratory hammers for 15 seconds at reduced energy followed by a 1-minute waiting period. The procedure shall be repeated two additional times before full energy may be achieved.

(B) If a non-diesel impact hammer is used, BP is required to provide an initial set of strikes from the impact hammer at reduced energy, followed by a 1-minute waiting period, then two subsequent sets.

(C) If a diesel impact hammer is used, BP is required to turn on the sound attenuation device for 15 seconds prior to initiating pile driving.

(vi) New drilling into oil-bearing strata shall not take place during either open-water or spring-time broken ice conditions.

(vii) All non-essential boats, barge, and air traffic will be scheduled to avoid periods when bowhead whales are migrating through the area where they may be affected by noise from these activities.

(3) Helicopter flights to support Northstar activities must be limited to a corridor from Seal Island to the mainland, and, except when limited by weather or personnel safety, must maintain a minimum altitude of 1,000 ft

(305 m), except during takeoff and landing.

(4) Additional mitigation measures as contained in a Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter.

(b) [Reserved]

§ 217.145 Measures to ensure availability of species for subsistence uses.

When applying for a Letter of Authorization pursuant to § 217.147 or a renewal of a Letter of Authorization pursuant to § 217.149, BP must submit a Plan of Cooperation that identifies what measures have been taken and/or will be taken to minimize any adverse effects on the availability of marine mammal species or stocks for taking for subsistence uses. A plan shall include the following:

(a) A statement that the applicant has notified and met with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding timing and methods of operation;

(b) A description of what measures BP has taken and/or will take to ensure that the proposed activities will not interfere with subsistence whaling or sealing; and

(c) What plans BP has to continue to meet with the affected communities to notify the communities of any changes in operation.

§ 217.146 Requirements for monitoring and reporting.

(a) BP must notify the Alaska Regional Office, NMFS, within 48 hours of starting ice road construction, cessation of ice road usage, and the commencement of icebreaking activities for the Northstar facility.

(b) BP must designate qualified, on-site individuals, approved in advance by NMFS, to conduct the mitigation, monitoring, and reporting activities specified in the Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter.

(c) Monitoring measures during the ice-covered season shall include, but are not limited to, the following:

(1) After March 1, trained dogs must be used to detect seal lairs in previously undisturbed areas that may be potentially affected by on-ice construction activity, if any. Surveys for seal structures should be conducted to a minimum distance of 492 ft (150 m) from the outer edges of any disturbance.

(2) If ice road construction occurs after March 1, conduct a follow-up assessment in May of that year of the fate of all seal structures located during monitoring conducted under paragraph (c)(1) of this section near the physically disturbed areas.

(3) BP shall conduct acoustic measurements to document sound levels, characteristics, and transmissions of airborne sounds with expected source levels of 90 dBA or greater created by on-ice activity at Northstar that have not been measured in previous years. In addition, BP shall conduct acoustic measurements to document sound levels, characteristics, and transmissions of airborne sounds for sources on Northstar Island with expected received levels at the water's edge that exceed 90 dBA that have not been measured in previous years.

(d) Monitoring measures during the open-water season shall include, but are not limited to, the following:

(1) Acoustic monitoring of the bowhead whale migration.

(2) BP shall monitor the exclusion zones of activities capable of producing pulsed underwater sound with levels ≥180 or ≥190 dB re 1 μPa (rms) at locations where cetaceans or seals could be exposed. At least one on-island observer shall be stationed at a location providing an unobstructed view of the predicted exclusion zone. The observer(s) shall scan the exclusion zone continuously for marine mammals for 30 minutes prior to the operation of the sound source. Observations shall continue during all periods of operation and for 30 minutes after the cessation of the activity. The observer shall record the: species and numbers of marine mammals seen within the 180 or 190 dB zones; bearing and distance of the marine mammals from the observation point; and behavior of marine mammals and any indication of disturbance reactions to the monitored activity.

(e) BP shall conduct any additional monitoring measures contained in a Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter.

(f) BP shall submit an annual report to NMFS within the time period specified in a Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter.

(g) If specific mitigation and monitoring are required for activities on the sea ice initiated after March 1 (requiring searches with dogs for lairs), during the operation of strong sound sources (requiring visual observations and shutdown procedures), or for the use of new sound sources that have not previously been measured, then a preliminary summary of the activity, method of monitoring, and preliminary results shall be submitted to NMFS within 90 days after the cessation of that activity. The complete description of methods, results, and discussion shall be submitted as part of the annual report described in paragraph (f) of this section.

(h) BP shall submit a draft comprehensive report to NMFS, Office of Protected Resources, and NMFS, Alaska Regional Office (specific contact information to be provided in Letter of Authorization), no later than 240 days prior to the expiration of the regulations in this subpart. This comprehensive technical report shall provide full documentation of methods, results, and interpretation of all monitoring during the first four and a quarter years of the LOA. Before acceptance by NMFS as a final comprehensive report, the draft comprehensive report shall be subject to review and modification by NMFS scientists.

(i)(1) In the unanticipated event that Northstar operations clearly causes the death of more than five ringed seals annually or the take of a marine mammal in a manner prohibited by this final rule, such as an injury (Level A harassment), serious injury or mortality (e.g., ship-strike, gear interaction), BP shall immediately take steps to cease the operations that caused the unauthorized take and report the incident as soon as practicable and no later than 24 hours after the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, or his designee, the Alaska Regional Office, and the Alaska Regional Stranding Coordinators (specific contact information to be provided in Letter of Authorization). The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the incident;

(ii) The type of equipment involved in the incident;

(iii) Description of the incident;

(iv) Water depth, if relevant;

(v) Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(vi) Species identification or description of the animal(s) involved;

(vii) The fate of the animal(s); and

(viii) Photographs or video footage of the animal (if equipment is available).

(2) Activities shall not resume until NMFS is able to review the circumstances causing the exceedance of the authorized take. NMFS will work with BP to identify additional measures to minimize the likelihood that more than five ringed seals will not be killed each year (or other marine mammal species that may have been injured, seriously injured, or killed) from BP's activities. BP may not resume their activities until notified by NMFS via letter, email, or telephone.

(3) In the event that BP discovers an injured or dead marine mammal, and it

is determined that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), BP will report the incident/discovery as soon as practicable and no later than 24 hours after the incident/discovery to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, by phone or email, the Alaska Regional Office, and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinators (specific contact information to be provided in Letter of Authorization). The report must include the same information identified in § 217.146(i)(1). Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with BP to determine whether modifications in the activities are appropriate.

(4) In the event that BP discovers an injured or dead marine mammal, and it is determined that the injury or death is not associated with or related to the activities authorized in this final rule (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), BP shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, by phone or email and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinators (specific contact information to be provided in Letter of Authorization), as soon as practicable and no later than 24 hours after the discovery. BP shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Activities may continue while NMFS reviews the circumstances of the incident.

§ 217.147 Applications for Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. Citizen (as defined by § 216.103 of this chapter) conducting the activity identified in § 217.140(a) (i.e., BP) must apply for and obtain either an initial Letter of Authorization in accordance with § 217.148 or a renewal under § 217.149.

(b) [Reserved]

§ 217.148 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, shall be valid for a period of time not to exceed the period of validity of this subpart.

(b) The Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s) and will not have an unmitigable adverse impact on the availability of species or stocks of marine mammals for taking for subsistence uses.

§ 217.149 Renewal of Letters of Authorization and adaptive management.

(a) A Letter of Authorization issued under § 216.106 and § 217.148 of this chapter for the activity identified in § 217.140(a) shall be renewed upon request by the applicant or determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations, provided that:

(1) NMFS is notified that the activity described in the application submitted under § 217.147 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) NMFS receives the monitoring reports required under § 217.146(f) and (g); and

(3) NMFS determines that the mitigation, monitoring and reporting measures required under §§ 217.144 and 217.146 and the Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization.

(b) If either a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 217.149 of this chapter or a determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed substantive changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

(d) *Adaptive management*—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with BP regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from BP's monitoring from the previous year;

(2) Results from general marine mammal and sound research; or

(3) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

§ 217.150 Modifications of Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization issued by NMFS, pursuant to §§ 216.106 and 217.148 of this chapter and subject to the provisions of this subpart, shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 217.149, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.142(c), a Letter of Authorization issued pursuant to §§ 216.106 and 217.148 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

[FR Doc. 2013–29553 Filed 12–11–13; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 78, No. 239

Thursday, December 12, 2013

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No.FAA–2013–1041; Notice No. 25–13–40–SC]

Special Conditions: Bombardier Inc., Models BD–500–1A10 and BD–500–1A11 Series Airplanes; Electronic Flight Control System: Control Surface Awareness and Mode Annunciation

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Bombardier Inc. Models BD–500–1A10 and BD–500–1A11 series airplanes. These airplanes will have a novel or unusual design feature associated with control surface awareness and mode annunciation of the electronic flight control system. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send your comments on or before January 27, 2014.

ADDRESSES: Send comments identified by docket number FAA–2013–1041 using any of the following methods:

- Federal eRegulations Portal: Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- Mail: Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- Hand Delivery or Courier: Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.
- Fax: Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov/.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Joe Jacobsen, FAA, Airplane and Flightcrew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–2011; facsimile 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive on or before the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On December 10, 2009, Bombardier Inc. applied for a type certificate for their new Models BD–500–1A10 and BD–500–1A11 series airplanes (hereafter collectively referred to as ''C-series.'' The C-series airplanes are swept-wing monoplanes with a pressurized cabin. They share an identical supplier base and significant common design elements. The fuselage is aluminum alloy material, blended double-bubble fuselage, sized for nominal 5-abreast seating. Each airplane's powerplant consists of two under wing Pratt and Whitney PW1524G ultra-high bypass, geared turbofan engines. Flight controls are fly-by-wire flight with two passive/uncoupled side sticks. Avionics includes five landscape primary cockpit displays. The dimension of the airplanes encompass a wingspan of 115 feet; a height of 37.75 feet; and a length of 114.75 feet for the Model BD–500–1A10 and a length of 127 feet for the Model BD–500–1A11. Passenger capacity is designated as 110 for the Model BD–500–1A10 and 125 for the Model BD–500–1A11. Maximum takeoff weight is 131,000 pounds for the Model BD–500–1A10 and 144,000 pounds for the Model BD–500–1A11. Maximum takeoff thrust is 21,000 pounds for the Model BD–500–1A10 and 23,300 pounds for the Model BD–500–1A11. Range is 3,394 miles (5,463 kilometers) for both models of airplanes. Maximum operating altitude is 41,000 feet for both model airplanes.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (CFR) 21.17, Bombardier Inc. must show that the C-series airplanes meet the applicable provisions of 14 CFR part 25 as amended by Amendments 25–1 through 25–129 thereto.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the C-series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the C-series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36, and the FAA must issue a finding of regulatory adequacy under section 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The C-series airplanes will incorporate the following novel or unusual design features: A fly-by-wire electronic flight control system (EFCS) and no direct coupling from the flightdeck controller to the control surface. As a result, the pilot is not aware of the actual control surface position as envisioned under current airworthiness standards.

Discussion

These special conditions propose that the flightcrew receive a suitable flight control position annunciation when a flight condition exists in which nearly full surface authority (not crew-commanded) is being used. Suitability of such a display must take into account that some pilot-demanded maneuvers (e.g., rapid roll) are necessarily associated with intended full performance, which may saturate the surface. Therefore, simple alerting systems function in both intended and unexpected control-limiting situations. As a result, they must be properly balanced between providing necessary crew awareness and being a potential nuisance to the flightcrew. A monitoring system that compares airplane motion and surface deflection with the demand of the pilot side stick controller could help reduce nuisance alerting.

These special conditions also address flight control system mode annunciation. It proposes suitable mode annunciation be provided to the flightcrew for events that significantly change the operating mode of the system but do not merit the classic ''failure warning.''

These special conditions establish a level of safety equivalent to that provided by a conventional flight control system and existing regulations.

Applicability

As discussed above, these special conditions are applicable to the Models BD–500–1A10 and BD–500–1A11 series airplanes. Should Bombardier Inc. apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on two model series of airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the Bombardier Inc. Models BD–500–1A10 and BD–500–1A11 series airplanes.

1. Electronic Flight Control System: Control Surface Awareness and Mode Annunciation. In addition to the requirements of §§ 25.143, 25.671, and 25.672, the following requirements apply:

a. The system design must ensure that the flightcrew is made suitably aware whenever the primary control means nears the limit of control authority.

Note: The term ''suitably aware'' indicates annunciations provided to the flightcrew are appropriately balanced between nuisance and that necessary for crew awareness.

b. If the design of the flight control system has multiple modes of operation, a means must be provided to indicate to the flightcrew any mode that significantly changes or degrades the normal handling or operational characteristics of the airplane.

Issued in Renton, Washington, on November 27, 2013.

John Piccola,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–29685 Filed 12–11–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–1027; Directorate Identifier 2013–NM–121–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 737–600, –700, 700C, –800, –900, and –900ER series airplanes. This proposed AD was prompted by a report of installation of incorrect wire support clamps within the left and right Environmental Control Systems (ECS) bay area during production, which is a flammable leakage zone. Use of incorrect wire support clamps that are not fully cushioned could allow electrical power wiring to come in contact with the exposed metal of the improper clamp, causing a short circuit and subsequent electrical arcing. This proposed AD would require inspecting to identify the part number of the wire support clamp, and related investigative and corrective actions if necessary. We are proposing this AD to prevent electrical arcing and a potential ignition source, which, in combination with flammable fuel vapors, could result in a fuel tank explosion, and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by January 27, 2014.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–

2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the ADDRESSES section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Georgios Roussos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6482; fax: 425–917–6590; email: *georgios.roussos@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the ADDRESSES section. Include ''Docket No. FAA–2013–1027; Directorate Identifier 2013–NM–121–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We received a report of the installation of incorrect wire support clamps within the left and right Environmental Control Systems (ECS) bay area during production, which is a flammable leakage zone. Use of incorrect wire support clamps that are not fully cushioned could allow electrical power wiring to come in contact with the exposed metal of the improper clamp, causing a short circuit and subsequent electrical arcing. We are proposing this AD to prevent electrical arcing and a potential ignition source, which, in combination with flammable fuel vapors, could result in a fuel tank explosion, and consequent loss of the airplane.

Related Rulemaking

On November 18, 2010, we issued AD 2010–24–11, Amendment 39–16530 (75 FR 74616, December 1, 2010) for certain The Boeing Company Model 737–600, –700, –800, and –900 series airplanes. That AD required sealing the fasteners on the front end rear spars inside the main fuel tank and on the lower panel of the center fuel tank, inspecting the wire bundle support installation in the equipment cooling system bays to identify the type of clamp installed, and determine whether the Teflon sleeve was installed, and doing related corrective actions if necessary.

On February 20, 2013, we issued AD 2013–04–11, Amendment 39–17369 (78 FR 14644, March 7, 2013) for certain The Boeing Company Model 737–600, –700, –800, and –900ER series airplanes. That AD required inspections to identify the part number of the wire support clamp, related investigative actions, and corrective actions if necessary.

Relevant Service Information

We reviewed Boeing Special Attention Service Bulletin 737–28–1312, dated April 19, 2013. For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for Docket No. FAA–2013–1027. The related investigative actions include an eddy current inspection of the wing front spar for cracking and a detailed inspection of the bolt forward of the wing front spar upper chord for cracking or missing bolts. The corrective actions include repairing cracking and replacing bolts with new bolts.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously. The phrase ''related investigative actions'' is used in this proposed AD. ''Related investigative actions'' are those actions that are identified as follow-on actions that are: (1) Related to the primary action, and (2) are on-condition actions that further investigate the nature of any condition found. Related investigative actions could include, for example, inspections.

In addition, the phrase ''corrective actions'' is used in this proposed AD. ''Corrective actions'' are those actions that are on-condition actions that correct or address any condition found. Corrective actions could include, for example, repairs, removal and replacement, and modifications.

Clarification of Applicability in Paragraph (c) of This Proposed AD

The NOTE specified in Paragraph 1.A., ''Effectivity,'' of Boeing Special Attention Service Bulletin 737–28–1312, dated April 19, 2013, is in error. It does not impact the Variable Number list in paragraph 1.A.1. of that section. Therefore, for the applicability of this proposed AD, we have referred to the Variable Number list in paragraph 1.A.1., ''Effectivity,'' in paragraph (c) of this proposed AD.

Costs of Compliance

We estimate that this proposed AD affects 519 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	6 work-hours × $85 per hour = $510	$0	$510	$264,690

We estimate the following costs to do any necessary related investigative and corrective actions that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need these actions.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Related investigative and corrective actions.	1 work-hour × $85 per hour = $85	$3	$88

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

We have received no definitive data that would enable us to provide cost estimates for the on-condition repair of chafed or damaged wiring specified in this proposed AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

The Boeing Company: Docket No. FAA–2013–1027; Directorate Identifier 2013–NM–121–AD.

(a) Comments Due Date

We must receive comments by January 27, 2014.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737–600, –700, 700C, –800, –900, and –900ER series airplanes; certificated in any category; having a Variable Number identified in paragraph 1.A.1., Effectivity, of Boeing Special Attention Service Bulletin 737–28–1312, dated April 19, 2013.

(d) Subject

Air Transport Association (ATA) of America Code 28, Fuel System.

(e) Unsafe Condition

This AD was prompted by a report of installation of incorrect wire support clamps within the left and right Environmental Control Systems (ECS) bay area during production, which is a flammable leakage zone. Use of incorrect wire support clamps that are not fully cushioned could allow electrical power wiring to come in contact with the exposed metal of the improper clamp, causing a short circuit and subsequent electrical arcing. We are issuing this AD to prevent electrical arcing and a potential ignition source, which, in combination with flammable fuel vapors, could result in a fuel tank explosion, and consequent loss of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Inspection and Related Investigative and Corrective Actions

Within 60 months after the effective date of this AD: Do a detailed inspection to determine if a wire support clamp having part number (P/N) TA0930034–10, TA0930034–10P, TA0930034–11, or TA0930034–12P is installed, and do all applicable related investigative and corrective actions before further flight, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–28–1312, dated April 19, 2013.

(h) Parts Installation Prohibition

As of the effective date of this AD, no person may install a wire support clamp on any airplane within the ECS area defined in the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–28–1312, dated April 19, 2013, unless the clamp has P/N TA0930034–10, TA0930034–10P, TA0930034–11, or TA0930034–12P.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (j)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager

of the local flight standards district office/certificate holding district office.

(j) Related Information

(1) For more information about this AD, contact Georgios Roussos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6482; fax: 425–917–6590; email: *georgios.roussos@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 4, 2013.

John P. Piccola,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–29593 Filed 12–11–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 514 and 558

[Docket No. FDA–2010–N–0155]

RIN 0910–AG95

Veterinary Feed Directive

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its animal drug regulations regarding veterinary feed directive (VFD) drugs. FDA's VFD regulation, which became effective on January 8, 2001, established requirements relating to the distribution and use of VFD drugs and animal feeds containing such drugs. This proposed amendment is intended to improve the efficiency of FDA's VFD program.

DATES: Submit either electronic or written comments on the proposed rule by March 12, 2014. Submit comments on information collection issues under the Paperwork Reduction Act of 1995 (the PRA) by January 13, 2014, (see the ''Paperwork Reduction Act of 1995'' section).

ADDRESSES: You may submit comments, identified by Docket No. FDA–2010–N–0155, by any of the following methods, except that comments on information collection issues under the PRA must be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) (see the ''Paperwork Reduction Act of 1995'' section).

Electronic Submissions

Submit electronic comments in the following way

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Written Submissions

Submit written submissions in the following way:

• *Mail/Hand delivery/Courier (for paper or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2010–N–0155 for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Sharon Benz, Center for Veterinary Medicine (HFV–220), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–453–6864, email: *Sharon.Benz@fda.hhs.gov.*

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Executive Summary

Purpose of Proposed Rule

The purpose of this rulemaking is to revise FDA's VFD regulations to improve the efficiency of the VFD program.

In 1996, Congress enacted the Animal Drug Availability Act (ADAA) (Pub. L. 104–250) to facilitate the approval and marketing of new animal drugs and medicated feeds. In passing the ADAA, Congress created a new regulatory category for certain animal drugs used in animal feed called veterinary feed directive drugs or VFD drugs. VFD drugs are new animal drugs intended for use in or on animal feed which are limited to use under the professional supervision of a licensed veterinarian in the course of the veterinarian's professional practice. FDA published final regulations implementing the VFD-related provisions of the ADAA in 2000 (see § 558.6 (21 CFR 558.6)). In the decade since those regulations were issued, stakeholders informed FDA that the VFD process is overly burdensome. In response to those concerns, FDA published an advance notice of proposed rulemaking in March 2010, and a draft proposed regulation in April 2012.

As FDA begins to implement the judicious use principles for medically important antimicrobial new animal drugs approved for use in food-producing animals, based on the framework set forth in Guidance for Industry (GFI) #209 (published April 13, 2012), it is critical that the Agency makes the VFD program as efficient as possible for stakeholders while maintaining adequate protection for human and animal health. The provisions included in this proposed rule are based on stakeholder input received in response to multiple opportunities for public comment, including an advance notice of proposed rulemaking (ANPRM) (75 FR 15387, March 29, 2010) and draft text of proposed amendments to the current VFD regulations (77 FR 22247, April 13, 2012). FDA proposes that if this rule is finalized, it will become effective 60 days after publication of the final rule in the **Federal Register**.

Summary of Major Provisions

The proposed rule, if finalized, will make several major changes to the current VFD regulations in 21 CFR part 558:

• In order to provide increased flexibility for licensed veterinarians issuing VFDs, FDA is proposing to revise the definition of the term ''Veterinary Feed Directive'' in § 558.3 (21 CFR 558.3) which currently includes a relatively prescriptive, federally defined, code of veterinary professional conduct known as the veterinarian-client-patient relationship (VCPR). Specifically, the Agency proposes to remove the explicit VCPR provision and replace it with the requirement that veterinarians ordering the use of VFD drugs must do so ''in compliance with all applicable veterinary licensing and practice requirements.'' The purpose of this revision is to provide greater flexibility for veterinarians by deferring to the veterinary profession and individual states for the specific criteria for acceptable veterinary professional conduct, rather than relying on a more rigid, one-size-fits-all, Federal standard. From a practical standpoint, this enables the veterinary profession and individual states to adjust the specific criteria for a VCPR to appropriately align with current veterinary practice standards, technological and medical advances, and other regional considerations. For example, greater flexibility could allow veterinarians to more effectively provide services to food animal producers in remote geographical areas where veterinary professional resources are limited and distances are great.

• In order to prevent potential shortages of antimicrobial drugs needed by food animal producers for judicious therapeutic uses on their farms and ranches, FDA is proposing to revise the definition of ''Category II'' drugs in § 558.3. Under current regulations, all animal drugs approved for use in or on animal feed are assigned to one of two categories, depending on their potential to create unsafe drug residues in edible tissues—Category I drugs having the lowest potential and Category II drugs having the highest potential. In order to reduce the potential of creating unsafe drug residues, access to Category II drugs is restricted to licensed feed mills because these facilities are technically better suited to handle these drugs in a concentrated form. However, existing regulations include a provision that says *all* VFD drugs, regardless of their potential to create unsafe drug residues, are Category II drugs. Thus, under current regulations, if an over-the-counter (OTC) Category I drug changes to VFD status, it automatically becomes a Category II drug, which, in turn, limits its availability only to licensed feed mills. FDA is concerned that the automatic recategorization of drugs from Category I to Category II once they switch to VFD status is likely to cause a supply chain obstruction for VFD feeds once the Agency's policy regarding the judicious use of medically important antimicrobial drugs in food-producing animals is fully implemented. To avoid this outcome, FDA proposes to revise the definition of Category II to eliminate the automatic classification of VFD drugs into Category II. This would permit those medically important antimicrobials used in animal feed that are currently Category I drugs to become VFD drugs consistent with FDA's judicious use policy. At the same time, products containing these drugs would remain available through the current feed mill distribution system.

• In order to lower the recordkeeping burden associated with the use of VFD drugs, FDA is proposing to align the recordkeeping requirements for VFD drugs with the current Good Manufacturing Practices (cGMP) recordkeeping requirements for medicated feeds, thus reducing the recordingkeeping burden for VFD drugs from 2 years to 1 year. Under current § 558.6, all involved parties (the veterinarian, the distributor, and the client) must keep their copy of the VFD on file and available for FDA inspection for 2 years. In addition, VFD feed distributors must also keep receipt and distribution records of the VFD feeds they manufacture and make them available for FDA inspection for 2 years. However, the cGMP regulations for medicated feed manufacturing in 21 CFR part 225 require that such records be kept for only 1 year. Feed mill operators have told FDA that this discrepancy is difficult to manage and that they would like to see all feed manufacturing record retention requirements kept the same at 1 year. Based on our experience, FDA does not believe the extra 1 year of recordkeeping for VFD drugs is warranted for any of the involved parties. The value added by the second year of record retention has not been shown to justify the associated paperwork burden. Therefore, FDA is proposing to reduce the recordkeeping requirement for copies of VFDs for all involved parties, and for manufacturing receipt and distribution records for VFD distributors, from 2 years to 1 year.

Costs and Benefits

The estimated one-time costs to industry from this proposed rule, if finalized, are $920,000, most of which are costs to review the rule and prepare a compliance plan. This equates to annualized costs of about $131,000 at a 7 percent discount rate over 10 years. We estimate that the total government costs associated with reviewing the VFD drug labeling supplements that are expected to be submitted by all four VFD drug sponsors to be $1,200.

The expected benefit of this proposal is a general improvement in the efficiency of the VFD process. FDA estimates the annualized cost savings associated with the reduced requirements of the VFD process to be $19,000 over 10 years at a 7 percent discount rate (annualized at $16,000 over 10 years at a 3 percent discount rate). Additionally, the reduction in veterinarian labor costs due to this rule is expected to result in a cost savings of about $5.55 million annually.

I. Background

A. History

Before 1996, FDA had only two options for regulating the distribution of animal drugs: (1) OTC and (2) prescription (Rx). Drugs used in animal feeds were generally approved as OTC drugs. Although the Federal Food, Drug, and Cosmetic Act (the FD&C Act) did not prohibit the approval of prescription drugs for use in animal feed, such approvals have historically been impractical because many states have laws prohibiting feed manufacturers from dispensing prescription drugs. As newer animal drugs were developed, FDA determined that the existing regulatory options—OTC and Rx—did not provide the needed flexibility and safety for these drugs to be prescribed or administered through medicated feed. FDA believed that such drugs should be subject to greater control than provided by OTC status, particularly certain antimicrobial drugs. This control is critical to reducing unnecessary use of such drugs in animals and to slowing or preventing any potential for the development of bacterial resistance to antimicrobial drugs.

After considerable deliberation between FDA and the animal agriculture industry, and with the support of State regulatory Agencies, in 1996 Congress enacted the ADAA to facilitate the approval and marketing of new animal drugs and medicated feeds. As part of the ADAA, Congress determined that certain new animal drugs should be approved for use in animal feed but only if these medicated feeds were administered under a veterinarian's order and professional supervision. Therefore, the ADAA created a new category of products called veterinary feed directive drugs (or VFD drugs). VFD drugs are new animal drugs intended for use in or on animal feed, which are limited to use under the professional supervision of a licensed veterinarian in the course of the veterinarian's professional practice. For animal feed containing a VFD drug to be used in animals, a licensed veterinarian must first issue an order, called a veterinary feed directive (or VFD), providing for such use. In the **Federal Register** of December 8, 2000 (65 FR 76924), FDA issued a final rule amending the new animal drug regulations to implement the VFD-related provisions of the ADAA. In that final rule, FDA stated that because veterinarian oversight is so important for assuring the safe and appropriate use of certain new animal drugs, the Agency should approve such drugs for use in animal feed only if these medicated feeds are administered under a veterinarian's order and professional supervision. As an example, the final rule noted that safety concerns relating to the difficulty of disease diagnosis, drug toxicity, drug residues, antimicrobial resistance, or other reasons may dictate that the use of a medicated feed be limited to use by order and under the supervision of a licensed veterinarian.

It has been over a decade since FDA began implementing the final rule relating to VFDs. Although currently there are few approved VFD drugs, FDA has received comments from stakeholders characterizing the current VFD process as being overly burdensome. When veterinary oversight of a medicated feed is determined to be necessary, it is essential that such oversight be facilitated through an efficient VFD process.

In response to these concerns, the Agency began exploring ways to improve the VFD program's efficiency. To that end, FDA initiated the rulemaking process through the publication of an ANPRM in the **Federal Register** of March 29, 2010 (75 FR 15387). The ANPRM requested public comment on whether efficiency improvements are needed and, if so, what specific revisions should be made to the VFD regulations. Subsequent to this, FDA published draft text of a proposed VFD regulation (hereinafter, ''draft proposed regulation'') in the **Federal Register** of April 13, 2012 (77 FR 22247), based on the considerable public input provided to the ANPRM docket, and requested comment on this draft text. The provisions included in this proposed rule reflect the public input FDA received. FDA proposes that if this rule is finalized, it will become effective 60 days after publication of the final rule in the **Federal Register**.

B. Judicious Use Policy for Medically Important Antimicrobials

On April 13, 2012, FDA finalized a guidance document entitled ''The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals'' (GFI #209). This final guidance represents the Agency's current thinking regarding antimicrobial drugs that are medically important in human medicine and used in food-producing animals. Specifically, GFI #209 discusses FDA's concerns regarding the development of antimicrobial resistance in human and animal bacterial pathogens when medically important antimicrobial drugs are used in food-producing animals in an injudicious manner. In addition, GFI #209 provides two recommended principles regarding the appropriate or judicious use of medically important antimicrobial drugs: (1) Limit medically important antimicrobial drugs to uses in animals that are considered necessary for assuring animal health and (2) limit medically important antimicrobial drugs to uses in animals that include veterinary oversight or consultation.

Implementation of these judicious use principles, particularly the second principle, reinforces the need for FDA to reconsider the current VFD program and how best to make the program more efficient and less burdensome for stakeholders while maintaining adequate protection for human and animal health. Currently, the vast majority of the antimicrobial animal drug products that are the focus of GFI #209 are feed-use drugs—that is, they are products approved for use in or on animal feed. All but a few of these products are currently available OTC without veterinary oversight or consultation and would be affected by the recommendation to switch to VFD status. It is critical, therefore, that the VFD process be as efficient as possible when FDA's judicious use policy is fully implemented because an overly burdensome VFD process could lead to unanticipated disruptions in the current channels of commercial feed distribution.

II. Highlights of the Proposed Rule

The primary purpose of this rulemaking is to improve the efficiency of the VFD program, while still ensuring that VFD drugs are used in a manner that affords adequate protection for human and animal health. The key changes in this proposal include:

- User-friendly reorganization of the VFD regulation;
- increased flexibility for licensed veterinarians issuing VFDs;
- continued access to Category I Type A medicated articles by unlicensed feed mills;
- increased flexibility for animal producers purchasing VFD feeds; and
- lower recordkeeping burden for all involved parties.

A. User-Friendly Reorganization of the VFD Regulation

The proposed rule, if finalized, will revise and reorganize the existing VFD regulation at § 558.6 to make it more user-friendly. Proposed § 558.6 includes only three subsections, (a), (b), and (c), in contrast to the existing regulation, which has six subsections. In addition, for ease in identifying what is expected from each party involved in the VFD process, the proposed rule organizes the provisions by affected party or stakeholder group. Subsection (a) contains general provisions that are common to all affected parties, including veterinarians, distributors, and clients (including clients that are on-farm mixers handling VFD drugs and feeds for use in their own animals). Subsection (b) contains specific provisions for veterinarians and subsection (c) contains specific provisions for animal feed distributers. Consistent with public comments we received on the ANPRM and draft regulation, these revisions are intended to make it clearer what is expected from each of these parties. Important aspects of subsection (b) include that the veterinarian issuing the VFD must be licensed and must assure that the VFD is complete and accurate before it is issued. The veterinarian must also assure that the terms of the VFD are in compliance with the conditions for use approved, conditionally approved, or indexed for the VFD drug. Important aspects of subsection (c) include that the VFD feed distributor is responsible for assuring that the VFD is complete before filling the order. The VFD feed distributor must also assure that the medicated feed is manufactured and labeled in accordance with the VFD *and* in conformity with the approved, conditionally approved, or indexed conditions of use. See section III for a more detailed description of these provisions.

B. Increased Flexibility for Licensed Veterinarians Issuing VFDs

FDA proposes to modify provisions in the existing regulation at 21 CFR part 558 relating to professional conduct by veterinarians issuing orders for VFD drugs in several important ways. First, in order to provide greater flexibility for veterinarians, FDA is proposing to revise the definition of the term ''Veterinary Feed Directive'' in § 558.3(b)(7) which currently includes a relatively prescriptive, federally-defined, code of veterinary professional conduct known as the VCPR. Specifically, the Agency proposes to remove the explicit VCPR provision and replace it with the requirement that veterinarians ordering the use of VFD drugs must be ''in compliance with all applicable veterinary licensing and practice requirements.'' The purpose of this revision is to provide greater flexibility for veterinarians by deferring to the veterinary profession and individual states for the specific criteria for acceptable veterinary professional conduct, rather than relying on a more rigid, one-size-fits-all, Federal standard. As discussed further below, the veterinary profession and individual state veterinary medical licensing boards already embrace the concept of a VCPR as an element of veterinary licensing and practice requirements. From a practical standpoint, this proposal would enable the veterinary profession and individual states to adjust the specific criteria for a VCPR to appropriately align with current practice standards, technological and medical advances, and other regional considerations. For example, providing for this greater degree of flexibility is of particular importance for those veterinarians providing services to producers in remote geographical areas where veterinary professional resources are limited and distances are great. Further, this proposal provides greater flexibility for veterinarians working in consultation with other animal health professionals, such as poultry pathologists and fish health biologists. The need for greater flexibility in a veterinarian's professional relationship with his or her clients and patients will become increasingly important as FDA's judicious use policy for medically important antimicrobial dugs is implemented.

Second, FDA is proposing to further revise the definition of the term ''Veterinary Feed Directive'' in § 558.3(b)(7) to explicitly incorporate the concept of veterinary ''supervision or oversight.'' Section 504(a)(1) of the FD&C Act (21 U.S.C. 354(a)(1)) states that a veterinary feed directive drug is a drug intended for use in or on animal feed which is limited to use under the professional ''supervision'' of a licensed veterinarian. In addition, the second judicious use principle of GFI #209 recommends veterinary ''oversight'' when using medically important antimicrobial drugs in food-producing animals. Therefore, to better align the VFD regulations with the statute and with the judicious use principles outlined in GFI #209, we propose to incorporate the phrase ''supervision or oversight'' in the revised definition of VFD. Thus, the proposed revised definition for VFD would require that a veterinarian may only issue a VFD for the use of VFD drugs in animals that are under his or her ''supervision or oversight.''

Third, the current definition of ''Veterinary Feed Directive'' in § 558.3(b)(7) includes another requirement for professional veterinary conduct, which also is derived from the VFD provisions in section 504 of the FD&C Act. This requirement is found in the phrase ''. . . licensed veterinarian in the course of the veterinarian's professional practice . . .'' which also appears in the first sentence of the current definition in § 558.3(b)(7). (See section 504(a)(1) of the FD&C Act.) FDA proposes to retain this provision in the revised definition of the term ''VFD.''

By combining these three elements, the proposed revised requirement for veterinarians issuing orders for the use of VFD drugs found in this rule, as derived from the proposed revised definition of the term ''VFD,'' would include language stating that a licensed veterinarian may only issue a VFD for the use of VFD drugs in animals ''under his or her supervision or oversight in the course of his or her professional practice, and in compliance with all applicable veterinary licensing and practice requirements.''

It is important to remember that this provision would only apply to on-label animal drug use. The statutory provision for an explicit, federally defined VCPR, which was introduced with the Animal Medicinal Use Clarification Act of 1994 (AMDUCA) (Pub. L. 103–396) (see section 512(a)(4)(A)(i) of the FD&C Act (U.S.C. 360b(a)(4)(A)(i))) and defined by regulation (see § 530.3(i)), continues to apply in circumstances involving extralabel animal drug use. However, because AMDUCA specifically prohibits extralabel use of animal drugs in or on animal feed, including VFD drugs, FDA does not believe that the explicit VCPR requirement as defined in § 530.3(i) is necessary in the context of VFD drug use.

Furthermore, since extralabel use is not an option for medicated feeds, including medicated feeds containing VFD drugs, the final use and labeling of such feeds must also conform to an FDA-approved, or conditionally approved, new animal drug application or index listing (see section 512(a)(2) of the FD&C Act). In other words, the terms of the VFD, such as intended use or dosage regimen, are constrained by the conditions of use found in an approved application, conditionally approved application, or index listing. Therefore, when completing the VFD order, the veterinarian needs to make sure the VFD is consistent with the conditions of use in the approved application, conditionally approved application, or index listing; similarly, when filling a valid VFD, the medicated feed manufacturer must assure that the final medicated feed is manufactured and labeled in conformity with both the VFD *and* the approved, conditionally approved, or indexed conditions for use. If the conditions of use specified on a VFD are not in conformity with an approved new animal drug application, conditionally approved application, or index listing, the VFD is considered invalid and the medicated feed described on the VFD may not be manufactured or distributed.

This proposed revision is not intended to lower the standard for professional conduct by veterinarians. Instead of continuing to impose explicit, federally defined VCPR requirements on veterinarians using VFD drugs in their professional practice, these proposed revisions would, consistent with the approach to regulating veterinary professional conduct in the context of prescription animal drug use, recognize and appropriately defer to existing regulatory oversight standards for veterinary professional conduct. This includes VCPR standards that have been established by the veterinary profession and individual state veterinary medical licensing boards. The Agency believes that state veterinary medical licensing boards are well suited for this role because of their unique perspective on factors such as the local availability of professional veterinary medical resources and the needs of their individual agricultural communities. However, while each state's veterinary medical practice code may be somewhat different, the practice of veterinary medicine in the United States is, to a great extent, guided by the American

Veterinary Medical Association (AVMA) and its Principles of Veterinary Medical Ethics,[1] which acts as a unifying standard for all veterinarians. AVMA's Principles of Veterinary Medical Ethics include an explicit VCPR provision.

As noted earlier, the Agency intends to provide for greater flexibility by deferring to the veterinary profession and individual states for the specific criteria for complying with the concept of a VCPR as an element of veterinary licensing and practice requirements. This would allow the specific criteria for a VCPR to be adjusted as appropriate to align with the most recent practice standards, technological and medical advances, and practical considerations in particular regions of the country.

C. Continued Access to Category I Type A [2] Medicated Articles by Unlicensed Feed Mills

Under the current VFD regulations, all medicated feed distributors, licensed or unlicensed, are able to manufacture and sell medicated feeds containing VFD drugs. The only difference is that licensed facilities are able to start the manufacturing process with a VFD Type A medicated article and unlicensed facilities must start with a VFD Type B [3] or Type C [4] medicated feed. In other words, unlicensed feed mills are not allowed access to *any* VFD Type A medicated articles under current regulations. FDA proposes to amend the VFD regulations to allow unlicensed feed mills to have continued access to the Type A medicated articles they currently use when these drugs change from OTC to VFD status.

For many years, FDA has restricted access to certain Type A medicated articles in an effort to avoid creating unsafe levels of drug residues in edible animal tissues. Under current regulations, all animal drugs approved for use in or on animal feed are assigned to one of two categories, depending on their potential to create unsafe residues—Category I drugs having the lowest potential and Category II drugs having the highest potential. FDA regulations at § 558.3(b)(1)(i) (21 CFR 558.3(b)(1)(i)) define Category I as those drugs that require no withdrawal period at the lowest use level in each species for which they are approved. Section 558.3(b)(1)(ii) (21 CFR 558.3(b)(1)(ii)) defines Category II, in part, as those drugs that require a withdrawal period at the lowest use level for at least one species for which they are approved, or are regulated on a ''no-residue'' basis or with a zero tolerance because of a carcinogenic concern regardless of whether a withdrawal period is required. In order to reduce the potential of creating unsafe drug residues, access to Category II Type A medicated articles is restricted to licensed feed mills (see § 558.4(a)) because these facilities are technically better suited to handle these drugs in this concentrated form. Unlicensed facilities can safely handle Category II drugs after they have been diluted to a Type B or Type C feed, as well as Category I Type A medicated articles. But the current definition of Category II drugs also includes a provision that says *all* VFD drugs, regardless of their potential to create unsafe residues, are Category II drugs. Thus, under current regulations, if an OTC Category I drug changes to VFD status, it automatically becomes a Category II drug which, in turn, limits the availability of its Type A medicated article to licensed feed mills.

FDA is concerned that the automatic recategorization of drugs to Category II once they switch to VFD status is likely to cause a supply chain obstruction for VFD feeds once the Agency's judicious use policy regarding medically important antimicrobial drugs is fully implemented. This is because the majority of the OTC feed-use antimicrobials that are the focus of GFI #209 are currently Category I drugs, making their Type A medicated articles readily available to tens of thousands of unlicensed feed mills, including on-farm mixers, located throughout the United States. Therefore, if all of these drugs were to switch dispensing status from OTC to VFD, and automatically become Category II drugs, these unlicensed facilities will now be forced to purchase VFD drugs as Type B or Type C medicated feeds from licensed facilities, which currently number fewer than 1,000. This limited number of licensed facilities would have great difficulty meeting the demands of the tens of thousands of unlicensed facilities in the United States. FDA believes this would result in shortages of antimicrobial drugs needed by food animal producers for judicious therapeutic uses on their farms and ranches, thus compromising animal health. To avoid this outcome, FDA proposes to revise the definition of Category II in § 558.3(b)(1)(ii) by removing the final clause that currently reads ''. . . or are a veterinary feed directive drug,'' thereby eliminating the automatic classification of VFD drugs to Category II. This would permit those medically important antimicrobials used in animal feed that are already Category I drugs to become VFD drugs consistent with FDA's judicious use policy, but remain available through the current feed mill distribution system.

Furthermore, FDA has reconsidered its previous position that all VFD drugs should be classified as Category II drugs (see final rule of December 8, 2000 (65 FR 76924 at 76926)). Based on our experience with VFD drugs (e.g., investigating animal drug residue violations, cGMP inspections), the Agency no longer believes that the enhanced inspection requirements for licensed feed mills are necessary to assure the safe and effective use of VFD drugs that would otherwise be classified as Category I drugs. This is because (as noted in section II.E) feed-use drugs, in general, have a very safe record of use and Category I feed-use drugs, because of their extremely safe pharmacological and toxicological profile, have the lowest potential of creating unsafe drug residues at their approved dose levels.

D. Increased Flexibility for Food Animal Producers Purchasing VFD Feeds

A number of stakeholders responding to the ANPRM and draft proposed regulation requested that FDA remove the requirement for veterinarians to include the amount of medicated feed to be dispensed on the VFD, as is currently required in § 558.6(a)(4)(vi). Although this request was voiced by respondents from several different food animal production industries, each of them based their request on the difficulty of predicting, prior to feeding, exactly how much medicated feed a particular flock, herd, pen, house, or tank of animals will actually consume during a specific period of drug administration. Feed consumption rates can vary significantly depending on several factors, including environmental conditions. However, the most important sources of variability lie

[1] *https://www.avma.org/KB/Policies/Pages/Principles-of-Veterinary-Medical-Ethics-of-the-AVMA.aspx.*

[2] A ''Type A medicated article'' is intended solely for use in the manufacture of another Type A medicated article or a Type B or Type C medicated feed. It consists of a new animal drug(s), with or without carrier (e.g., calcium carbonate, rice hull, corn, gluten) with or without inactive ingredients.

[3] A ''Type B medicated feed'' is intended solely for the manufacture of other medicated feeds (Type B or Type C). It contains a substantial quantity of nutrients including vitamins and/or minerals and/or other nutritional ingredients in an amount not less than 25 percent of the weight. It is manufactured by diluting a Type A medicated article or another Type B medicated feed.

[4] A ''Type C medicated feed'' is intended as the complete feed for the animal or may be fed ''top dressed'' on (added on top of usual ration) or offered ''free-choice'' (e.g., supplement) in conjunction with other animal feed. It contains a substantial quantity of nutrients including vitamins, minerals, and/or other nutritional ingredients. It is manufactured by diluting a Type A medicated article or a Type B medicated feed. A Type C medicated feed may be further diluted to produce another Type C medicated feed.

in the animals' health status at the beginning of drug administration and how quickly these animals respond to treatment. Regardless of species, healthy animals generally eat more than sick animals. It is difficult to predict how quickly animals will respond to treatment and how quickly they will return to their normal feed consumption rate. In an effort to purchase or manufacture the right amount of medicated feed, food animal producers often monitor feed consumption rates during the treatment period and later make adjustments in feed orders accordingly.

As noted by several stakeholders, if the veterinarian is required to specify on the VFD the amount of medicated feed to be dispensed, he or she may overestimate that amount in order to make sure the food animal producer does not run out of feed before the end of the treatment period. Unfortunately, this will often times result in leftover medicated feed on the farm. Alternatively, if the amount of medicated feed listed on the VFD is too little, the food animal producer may need to get another VFD to complete the course of treatment. FDA acknowledges stakeholders' concerns about the variability of feed consumption rates and therefore, in response to these concerns, proposes to eliminate the requirement for veterinarians to specify the amount of medicated feed to be dispensed on the VFD. FDA believes that the proposed new requirements for veterinarians to specify on the VFD the duration of use and the approximate number of animals to be fed the medicated feed, along with the current requirement to include the level of VFD drug in the feed, should provide adequate control over the total amount of medicated feed authorized by the VFD.

E. Lower Recordkeeping Burden for All Involved Parties

Another commonly heard suggestion from stakeholders responding to the ANPRM and draft proposed regulation is the need to reduce the VFD recordkeeping burden from 2 years to 1 year. Under the current VFD regulation, all involved parties (the veterinarian, the distributor, and the client) must keep their copy of the VFD on file and available for FDA inspection for 2 years (see current § 558.6(c)). In addition, VFD feed distributors must also keep receipt and distribution records of the VFD feeds they manufacture and make them available for FDA inspection for 2 years (see current § 558.6(e)).

As noted in FDA's proposed VFD rule that was published in the **Federal Register** on July 2, 1999 (64 FR 35966), the usual and customary manufacturing records kept by distributors to comply with the cGMP regulations in 21 CFR part 225 satisfies the VFD receipt and distribution recordkeeping requirement as well (see 21 CFR part 225, subpart E (licensed feed mill distributors) and subpart I (unlicensed feed mill distributors)). However, the cGMP regulations in part 225 only require that such records be kept for 1 year, in contrast to the 2-year requirement for VFD feeds in § 558.6(e). Feed mill operators have told us that this discrepancy is difficult to manage and that they would like to see all feed manufacturing record retention requirements kept the same at 1 year, thus eliminating the need for two separate filing systems: One for non-VFD feed records (1-year record retention) and one for VFD feed records (2-year record retention).

Based on our experience, FDA does not believe the extra 1 year of recordkeeping for VFD drugs is warranted for any of the involved parties. The value added by the second year of record retention has not been shown to justify the associated paperwork burden. FDA compliance investigations regarding violative drug residues in edible animal tissues are normally completed within the first year of their detection and nearly all of these are associated with dosage form drugs (i.e., non-feed use drugs). Therefore, FDA is proposing to reduce the recordkeeping requirement for copies of VFDs for all involved parties, and for manufacturing receipt and distribution records for VFD distributors, from 2 years to 1 year. Because the usual and customary records of purchase and sales kept by distributors to comply with the cGMP regulations in part 225 adequately support the VFD inspection program, we have not included the VFD receipt and distribution recordkeeping requirement found in current § 558.6(e) in this proposed rule.

III. Proposed Regulations

A. Conforming Changes (Proposed § 514.1(b)(9)

The CFR citation noted in the new animal drug application regulations at 21 CFR 514.1(b)(9) would be revised to reflect the new VFD format provision found in proposed § 558.6(b)(3).

B. Definitions (Proposed § 558.3(b))

The definitions of terms used in the medicated feed regulations of part 558, including the VFD drug regulations in § 558.6, can be found in § 558.3(b). FDA proposes to amend § 558.3(b) as follows:

As discussed earlier in section II.C, FDA proposes to revise the definition of Category II in § 558.3(b)(1)(ii) by removing the final clause that currently reads ''. . . or are a veterinary feed directive drug.''

The definition of ''veterinary feed directive (VFD) drug'' in proposed § 558.3(b)(6) would be revised to include animal drugs that have been conditionally approved under section 571 of the FD&C Act (U.S.C. 360ccc), and to clarify that the use of a VFD drug in or on animal feed must be authorized by a valid veterinary feed directive.

FDA also proposes to revise the definition of ''veterinary feed directive'' in proposed § 558.3(b)(7) to include animal drugs that have been conditionally approved under section 571 of the FD&C Act and to replace the current federally defined VCPR requirement with a more broadly defined standard for veterinary professional conduct, as discussed in section II.B. The revised definition would also clarify that VFDs must be written, meaning nonverbal, and that they may be issued in hardcopy or through electronic media.

Additionally, several stakeholders responding to the ANPRM and draft proposed regulation were unclear about what is a medicated feed distributor. The term ''distributor'' as used in part 558 is defined in § 558.3(b)(9). We are proposing revisions to that definition for improved clarity. Please note that on-farm mixers that only manufacture medicated feeds for use in their own animals are not distributors.

Proposed § 558.3(b)(11) would revise the definition of ''acknowledgement letter'' for clarity. Under current regulations, acknowledgement letters must include three affirmation statements and this proposal would require the same three affirmations. However, two of these three affirmation statement provisions are currently found in § 558.3(b)(11) and one affirmation statement provision is currently found in § 558.6(d)(2). This proposal would simply put all three provisions together in the definition of ''acknowledgement letter'' for clarity. The revised definition would also clarify that acknowledgement letters must be written, meaning nonverbal, and that they may be sent in hardcopy or through electronic media.

Proposed § 558.3(b)(12) includes the new term ''combination veterinary feed directive (VFD) drug'' to account for combination animal drugs used in or on animal feed that include one or more VFD drugs.

C. General Requirements Related to VFD Drugs (Proposed § 558.6(a))

As noted in section II.A, proposed § 558.6(a) contains general provisions that are common to all involved parties (the veterinarian, the distributor, and the client). This includes clients that are also on-farm mixers that only manufacture VFD feeds for use in their own animals.

Proposed § 558.6(a)(1) establishes that a VFD may only be issued by a licensed veterinarian for the use of VFD drugs in animals under his or her supervision or oversight in the course of his or her professional practice, and in compliance with all applicable veterinary licensing and practice requirements.

Proposed § 558.6(a)(3) reminds stakeholders that the extralabel use (ELU) of any medicated feed, including medicated feeds containing VFD drugs, is not permitted under Federal law. (See section 512(a)(4)(A) of the FD&C Act.) Several stakeholders responding to the ANPRM and draft regulation requested that FDA allow ELU for VFD feeds. AMDUCA legalized, for the first time, ELU of approved drugs in animals. However, AMDUCA specifically prohibits ELU of such drugs in or on animal feed. (See Pub. L. 103–396.)

Proposed § 558.6(a)(4) establishes that all involved parties (the veterinarian, the distributor, and the client) must retain their copy of the VFD for 1 year. This proposal would lower the current 2-year recordkeeping requirement, as discussed in section II.E.

Proposed § 558.6(a)(6) revises the required cautionary labeling statement for all VFD drugs and feeds.

D. Responsibilities of the Veterinarian Issuing the VFD (Proposed § 558.6(b))

Proposed § 558.6(b)(1) reiterates that a VFD may only be issued by a licensed veterinarian for the use of VFD drugs in animals under his or her supervision or oversight in the course of his or her professional practice, and in compliance with all applicable veterinary licensing and practice requirements. This would replace the current federally defined VCPR provision that cites § 530.3(i), as discussed in section II.B.

Proposed § 558.6(b)(2) clarifies that, when issuing a VFD, the veterinarian must issue a VFD that is in compliance with the conditions for use approved, conditionally approved, or indexed for the VFD drug. In other words, a VFD that is written for an extralabel use fails to comply with Federal law and is invalid. (See section 504(a)(2)(B) of the FD&C Act.)

Proposed § 558.6(b)(3) includes a revised list of information that the veterinarian would be required to provide on the VFD.

Proposed § 558.6(b)(3)(v) includes a new provision that, in cases where the expiration date is not specified in the approval, conditional approval, or index listing, the expiration date of the VFD cannot exceed 6 months after the date of issuance.

Proposed § 558.6(b)(3)(vii) would require animal identification to include species and production class.

Proposed § 558.6(b)(3)(viii) would revise the current requirement for the number of animals to be treated to mean an approximate number of animals to be fed the medicated feed prior to the expiration date on the VFD, due to the difficulty in determining the exact number of animals to be treated during the duration of the valid VFD.

Proposed § 558.6(b)(3)(x) would remove the existing requirement for veterinarians to specify the amount of feed to be fed to the animals listed on the VFD, as discussed in section II.D. Veterinarians would instead be required to include the duration of drug use on the VFD in addition to the level of drug in the feed, as is currently required.

The proposal would remove the current requirement in § 558.6(a)(4)(xi) for veterinarians to include their license number and name of the issuing state on the VFD. This information is not needed by VFD recipients (clients and distributors) to assure the safe and effective use of VFD drugs and is not customarily used by FDA or state inspectors in compliance investigations.

Proposed § 558.6(b)(3)(xiii) would revise the statement required to be included in each VFD indicating that extralabel use is not permitted.

Proposed § 558.6(b)(3)(xiv) is a new provision that would require a veterinarian who issues a VFD for the use of medicated feed containing a VFD drug that is also one of the component drugs in an approved combination VFD drug to include one of three ''affirmation of intent'' statements on the VFD. Each of the three statements, found in proposed § 558.6(b)(6), provides a different option for veterinarians regarding their authorization for the use of a VFD drug as a component of an approved combination VFD drug. The definition of ''combination VFD drug'' can be found in proposed § 558.3(b)(12). The three options are as follows: (1) § 558.6(b)(6)(i): The VFD cannot be used to authorize any combination VFD drug (i.e., only medicated feed containing the VFD drug alone can be distributed using the VFD); or (2) § 558.6(b)(6)(ii): The VFD may be used for any of the approved combination VFD drugs specifically cited on the VFD; or (3) § 558.6(b)(6)(iii): The VFD may be used for any approved combination VFD drug.

In all cases, the VFD may be used to authorize the distribution and use of medicated feed containing the VFD drug alone.

Proposed § 558.6(b)(4) would allow the veterinarian, at his or her discretion, to enter additional information on the VFD to more specifically identify the animals authorized to be treated with or fed the medicated feed.

Proposed § 558.6(b)(5) would add a new provision for combination VFD drugs that include more than one VFD drug component. No such combinations have yet been approved, conditionally approved, or indexed, but in the event that such combination VFD drug is approved, conditionally approved, or indexed in the future, the veterinarian would need to include in the VFD certain drug-specific information for each component VFD drug in the combination.

The proposal would no longer specifically require that VFDs be produced in triplicate but all three involved parties (the veterinarian, the distributor, and the client) would still be required to receive and keep a copy of the VFD, either electronically or in hardcopy. If the VFD is transmitted electronically, the veterinarian would no longer be required to send a hardcopy to the distributor.

Proposed § 558.6(b)(9) would clarify that veterinarians may not issue a VFD verbally, including verbal transmission by telephone. However, transmission of a written (nonverbal) VFD by telephones that are capable of this function (i.e. smartphones) is allowed.

E. Responsibilities of the Medicated Feed Distributor (Proposed § 558.6(c))

Proposed § 558.6(c)(1) would require medicated feed distributors who handle VFD drugs to make sure all VFDs are completely filled out before manufacturing the specified VFD feed. VFDs that do not include all the information required by proposed § 558.6(b)(3) are incomplete and considered invalid.

Proposed § 558.6(c)(2) reminds medicated feed distributors that they may only distribute an animal feed containing a VFD drug or combination VFD drug that is in compliance with the terms of a valid VFD *and* is manufactured and labeled in conformity with the approved, conditionally approved, or indexed conditions of use for such drug. This dual responsibility is not new but is a very important concept that all VFD distributors must understand. VFDs that are not in compliance with the conditions of use approved, conditionally approved, or indexed for the VFD drug are invalid and may not be used to authorize the distribution of a medicated feed containing a VFD drug.

Proposed § 558.6(c)(3) reminds distributors that, in addition to other applicable recordkeeping requirements found in this section, they must also keep VFD feed manufacturing records 1 year in accordance with part 225 of this chapter. Such records must be made available for inspection and copying by FDA upon request.

Proposed §§ 558.6(c)(4), (5), and (6) relate to the statutory requirement for one-time notification by distributors of their intent to distribute medicated feed containing VFD drugs. These provisions are very similar to those found at section 558.6(d)(1) of the current regulation.

Proposed § 558.6(c)(7) retains the statutory requirement for medicated feed distributors that consign VFD drug-containing feeds to another distributor to receive an acknowledgement letter from that person. This section references a revised definition of ''acknowledgement letter'' found in proposed § 558.3(b)(11). Proposed § 558.6(c)(7) also includes an explicit 1-year recordkeeping requirement for acknowledgment letters.

IV. Legal Authority

FDA's authority for issuing this proposed rule is provided by section 504 of the FD&C Act. In addition, section 701(a) of the FD&C Act (21 U.S.C. 371(a)) gives FDA general rulemaking authority to issue regulations for the efficient enforcement of the FD&C Act.

V. Preliminary Regulatory Impact Analysis

FDA has examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct Agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Agency believes that this proposed rule is not a significant regulatory action as defined by Executive Order 12866. We have developed a preliminary regulatory impact analysis (PRIA) that presents the benefits and costs of this proposed rule to stakeholders and the government.

The summary analysis of benefits and costs included in the Executive Summary of this document is drawn from the detailed PRIA, which is available at *http://www.regulations.gov* (enter Docket No. FDA–2010–N–0155), and is also available on FDA's Web site at *http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm.*

VI. Paperwork Reduction Act of 1995

This proposed rule contains information collection provisions that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). A description of these provisions is given in the *Description* section that follows with estimates of the annual reporting, recordkeeping, and third-party disclosure burden. Included in each burden estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Title: Veterinary Feed Directives.

Description: The proposed rule would revise existing OMB control number 0910–0363 (expiration date December 31, 2014) for veterinary feed directives by lowering the recordkeeping burden without compromising human or animal safety, providing greater deference and flexibility to the veterinary profession for licensing and veterinary practice requirements, and ensuring continued access to Category I Type A medicated articles by unlicensed feed mills.

In 1996, the ADAA was enacted to facilitate the approval and marketing of new animal drugs and medicated feeds. Among other things, the ADAA created a new category of new animal drugs called veterinary feed directive drugs (or VFD drugs). VFD drugs are new animal drugs intended for use in or on animal feed, which are limited to use under the professional supervision of a licensed veterinarian in the course of the veterinarian's professional practice.

Currently, there are few approved VFD drugs. However, FDA has received feedback from stakeholders characterizing the current VFD process as being overly burdensome. In response to these concerns, FDA began exploring ways to improve the VFD program's efficiency. To this end, FDA published an ANPRM inviting public comment on possible VFD program efficiency improvements in March 2010. Based on the considerable public input received in response to the ANPRM, in April 2012 FDA issued for public comment draft text for proposed revisions to the current VFD regulation.

Current and Proposed Information Collection Requirements

The current veterinary feed directive regulation, § 558.6, has information collection provisions contained at OMB control number 0910–0363 (expiration date December, 31, 2014). Many of these provisions will be unaffected by the proposed rule, if finalized; therefore, this Paperwork Reduction Act section will concentrate on the changes being proposed in this rulemaking and will describe how the paperwork reduction implications will be affected.

Proposed Reporting Requirements

Description of Respondents: VFD Feed Distributors.

Currently, under § 558.6(d)(1) (and proposed § 558.6(c)(4)) a distributor of animal feed containing VFD drugs must notify FDA prior to the first time it distributes such animal feed and this notification is required one time per distributor. Therefore, all active distributors of animal feed must have already made notification to FDA of their intention to distribute animal feed containing VFD drugs in order to be in compliance with the current regulation. In addition, a distributor must provide updated information to FDA within 30 days of a change in ownership, business name, or business address.

Because the reporting requirements for distributors under proposed § 558.6(c)(4) are the same as the current requirements under § 558.6(d)(1), there is no new reporting burden. FDA understands that VFD feed distributors must review the rule in order to determine what actions are necessary to comply with the new regulation. For VFD feed distributors we estimate administrative review of the rule will take 4 hours to complete.

TABLE 1—ESTIMATED ONE-TIME REPORTING BURDEN [1]

21 CFR 558.6/activity	Number of respondents	Number of responses per respondent	Total responses	Average burden per respondent in hours	Total hours	Total costs
Administrative Review of the Rule (VFD Feed Distributors)	1,366	1	1,366	4	5,464	[2] $387,000

[1] There are no operating and maintenance costs associated with this collection of information.
[2] A total of 1,366 VFD feed distributors times approximately $71 per hour times 4 hours of one-time review equals approximately $387,000. Estimate rounded to be in accordance with the PRIA.

Number of Respondents multiplied by Number of Responses per Respondent equals Total Responses. Total Responses multiplied by Average Burden per Response equals Total Hours.

Proposed Recordkeeping Requirements

Description of Respondents: VFD Feed Distributors, Food Animal Veterinarians, and Clients (Food Animal Producers).

Under current § 558.6(f) and proposed § 558.6(a)(1), an animal feed containing a VFD drug or a combination VFD drug may be fed to animals only by or upon a lawful VFD issued by a licensed veterinarian. Veterinarians issue three copies of the VFD: One for their own records, one for their client, and one to the client's VFD feed distributor (current § 558.6(b)(1–3) and proposed § 558.6(a)(4) and proposed § 558.6(b)(7–8)). Under current § 558.6(b)(4), if the veterinarian sends the VFD to the client or distributor by electronic means, he or she must assure that the distributor receives the original, signed VFD within 5 working days. Also, under current § 558.6(c), all involved parties (the veterinarian, the distributor, and the client) must retain a copy of the VFD for 2 years. In addition, VFD feed distributors must also keep receipt and distribution records of VFD feeds they manufacture and make them available for FDA inspection for 2 years (see current § 558.6(e)).

Veterinarians and clients must review the rule to ensure compliance with their respective new requirements. In table 2 we estimate the hourly burden of this administrative review for both groups. (Administrative review of the rule by VFD feed distributors is accounted for in table 1.)

Recordkeeping costs are calculated as follows: 750,000 VFDs (an average of 375,000 VFDs issued per VFD drug) issued in triplicate equals 2,250,000 VFDs issued and stored in files per year.[5]

Assuming that currently all VFDs are issued and stored in hardcopy, we estimate it takes 300 large file cabinets to currently store these paper copy VFDs for 2 years, assuming 15,000 copies can be stored in a large file cabinet (see 64 FR 35966 at 35970). We estimate the average cost of a new file cabinet to be $600. Thus, we estimate that the current capital outlay for industry to store hardcopy VFDs for the required 2 years is $180,000 ($600 times 300 equals $180,000).

In response to public comment to the ANPRM, FDA is proposing to reduce the recordkeeping requirement for copies of VFDs for all involved parties (proposed § 558.6(a)(4)) from 2 years to 1 year. Additionally, as included in proposed § 558.6(b)(7), the veterinarian would also no longer be required to assure that a paper copy is received by the distributor within 5 days of writing the VFD if the original was faxed or otherwise transmitted electronically. This hardcopy requirement has become outdated by modern electronic communication and presents an unnecessary burden on the industry. This proposed provision would further reduce the number of paper copies requiring physical recordkeeping space.

We anticipate approximately one-half of the food animal industry will use electronic VFD generation and recordkeeping during the next 3 years of the information collection. As the use of computers for electronic storage of records has increased substantially since 2000 and is expected to continue to do so regardless of this proposed rule, the only marginal cost that would offset some of the reduction in file cabinet storage space costs would be the additional computer storage space that may be needed for electronic VFD forms. Because the cost of electronic storage capacity on computers has become extremely low, FDA regards this as a negligible cost and has not estimated it.

We anticipate that computer storage will eliminate the need for large amounts of physical space devoted to file cabinets. If, as we expect, one-half of the VFD recordkeepers (veterinarians, distributors, and clients) use electronic recordkeeping, this would result in a cost savings of $19,575 annually ($21.75 per square foot per year rental cost of space times 6 square feet per file cabinet times 150 filing cabinets equals $19,575 annual savings for switching to computer storage) (Thorpe, K., Edwards, J., and Bondarenko, E. Cassidy Turley Commercial Real Estate Services. ''U.S. Office Trends Report—2nd Quarter 2013.'' Page 10. *http://www.cassidyturley.com/Research/MarketReports/Report.aspx?topic=U_S_Office_Trends_Report&action=download,* 2nd Quarter 2013).

In addition, the proposed reduction in the amount of time records would be required to be kept from 2 years to 1 year would further reduce the need for physical space and file cabinets. The recordkeepers still filing hardcopy VFDs would save $9,788 annually ($21.75 per square foot per year rental cost of space times 6 square feet per file cabinet times 75 filing cabinets equals $9,788 annual savings for reducing recordkeeping from 2 years to 1 year).

In summary, we anticipate that the capital costs for recordkeeping will be reduced from $180,000 (storing all VFD copies in file cabinets for 2 years) to $45,000 (storing hardcopy VFD files in 75 file cabinets for 1 year), and an annual total cost savings of $29,363 for one-half of the industry filing VFDs electronically for 1 year ($19,575 savings for filing electronically plus $9,788 for reducing recordkeeping to 1 year).

As stated previously, both the current and proposed requirements state that the veterinarian, the distributor, and the client must keep a copy of the VFD. Whether a paper copy is filed or whether the VFD is filed electronically, we calculate that the time spent to file the VFD is the same at 0.167 hours. Therefore, no revision to the paperwork burden for filing the VFD is needed.

[5] Distributors may receive an acknowledgment letter in lieu of a VFD when consigning VFD feed to another distributor. Such letters, like VFDs, would also be subject to a 1-year record retention requirement (see proposed § 558.6(c)(7)). Thus, the recordkeeping burden for acknowledgment letters is included as a subset of the VFD recordkeeping burden.

TABLE 2—ESTIMATED ONE-TIME RECORDKEEPING BURDEN [1]

21 CFR 558.6/activity	Number of recordkeepers	Number of records per recordkeeper	Total records	Average burden per recordkeeper in hours	Total hours	Total costs
Administrative Review of the Rule (Food Animal Veterinarians)	3,050	1	3,050	1	3,050	[2] $180,000
Administrative Review of the Rule (Clients)	10,000	1	10,000	0.5	5,000	[3] 154,000
Recordkeeping by Electronic Storage for 1 Year						[4] 45,000
Total					8,050	379,000

[1] There are no operating and maintenance costs associated with this collection of information.
[2] A total of 3,050 veterinarians times approximately $59 per hour times 1 hour of one-time review equals approximately $180,000. Estimate rounded to be in accordance with the PRIA (see PRIA).
[3] A total of 10,000 clients times approximately $31 per hour times 0.5 hours one-time review equals approximately $154,000. Estimate rounded to be in accordance with the PRIA (see PRIA).
[4] We estimate that the capital costs for recordkeeping will be reduced from $180,000 (storing paper copies of all VFDs in file cabinets for 2 years) to $45,000 (one-half of VFDs stored as paper copies in 75 file cabinets for 1 year), and an annual cost savings of $29,363 for one-half of the industry filing VFDs electronically for 1 year ($19,575 savings for filing electronically plus $9,788 for reducing recordkeeping to 1 year).

Number of Recordkeepers multiplied by Number of Records per Recordkeeper equals Total Records. Total Records multiplied by Average Burden per Recordkeeper equals Total Hours.

Proposed Third-Party Disclosure Requirements

Description of Respondents: VFD Drug Sponsors, Food Animal Veterinarians, VFD Feed Distributors, and Clients (Food Animal Producers)

VFD drug sponsors manufacture and label VFD drugs for use in medicated animal feed. FDA understands that sponsors must review the rule to ensure compliance with their disclosure requirements. In table 3 we estimate the hourly burden of this administrative review. (Administrative review of the rule by VFD feed distributors is accounted for in table 1 and by veterinarians and clients in table 2.)

All labeling and advertising for VFD drugs, combination VFD drugs, and feeds containing VFD drugs or combination VFD drugs must prominently and conspicuously display the following cautionary statement: ''Caution: Federal law restricts medicated feed containing this VFD drug to use by or on the order of a licensed veterinarian'' (proposed § 558.6(a)(6)). This verbatim statement is exempt from burden under the PRA because the Federal Government has provided the exact language for the cautionary statement. Therefore, the hourly and cost burdens for label supplement changes to the new specimen labeling for the Type A medicated article and the representative label for use by the feed manufacturer will not be counted.

The VFD must also include the following statement (proposed § 558.6(b)(3)(xiii): ''Extralabel use (i.e., use of this VFD feed in a manner other than as directed on the labeling) is not permitted.'' This verbatim statement is also exempt from burden under the PRA.

The veterinarian may restrict VFD authorization to only include the VFD drug(s) cited on the VFD or such authorization may be expanded to allow the use of the cited VFD drug(s) along with one or more OTC animal drugs in an approved, conditionally approved, or indexed combination VFD drug. The veterinarian must affirm his or her intent regarding combination VFD drugs by including one of the following statements on the VFD:

(i) ''The VFD drug(s) cited in this order may not be used in combination with any other animal drugs.''

(ii) ''The VFD drug(s) cited in this order may be used in combination with the following OTC animal drugs to manufacture an FDA-approved, conditionally approved, or indexed combination medicated feed.'' [List OTC drugs immediately following this statement.]

(iii) ''The VFD drug(s) cited in this order may be used in combination with any OTC animal drugs to manufacture an FDA-approved, conditionally approved, or indexed combination medicated feed'' (proposed § 558.6(b)(6)).

These verbatim statements are also exempt from burden under the PRA. The hourly and cost burdens to include these statements on the VFD as part of the rule are considered de minimis, however, as there are several other changes to the VFD form itself that will occur as the result of this proposed rulemaking, if finalized.

Proposed § 558.6(b)(3) includes various changes to the information that would need to be included on the VFD form that is filled out by the veterinarian in order for the VFD to be valid, including but not limited to, deleting the requirement that the veterinarian must include the amount of feed needed to treat the animals. Proposed § 558.6(b)(7) would allow veterinarians to send VFDs to the client or distributor via fax or other electronic means (as is currently permitted under § 558.6(b)(4)). However, if a VFD is transmitted electronically, the veterinarian would no longer be required to assure that the original, signed VFD is given to the distributor within 5 days. FDA estimates that a veterinarian currently requires about 0.25 hours to issue a VFD (i.e., research, fill out, and deliver all copies, including the original, signed VFD to the distributor). At a compensation rate of about $59 (veterinarian wage rate, see PRIA), the labor cost of currently issuing VFDs is estimated at $11.09 million (the estimated average of 750,000 VFDs issued annually times 0.25 hours to issue each VFD times $59 per hour equals approximately $11.09 million (rounded to be in accordance with the PRIA)). FDA estimates that the effect of this rule would be to reduce the average time to issue a VFD by 50 percent, or about 0.125 hours per VFD. This would result in a cost of about $5.55 million annually (the estimated average of 750,000 VFDs issued annually times 0.125 hours to issue each VFD times $59 per hour equals approximately $5.55 million (rounded to be in accordance with the PRIA)), a cost savings of about $5.55 million ($11.09 million − $5.55 million = approximately $5.55 million.

Currently, a distributor may only consign a VFD feed to another distributor if the originating distributor (consignor) first obtains a written acknowledgement letter from the receiving distributor (consignee) before the feed is shipped (§ 558.6(d)(2)). Because this current requirement is the same as that being proposed in § 558.6(c)(7), there is no new reporting burden.

Proposed § 558.6(c)(7), also includes an explicit recordkeeping requirement for acknowledgment letters. While the VFD final rule issued in December 2000 did not explicitly require distributors to retain acknowledgment letters for any specified period of time, a 2-year recordkeeping burden was accounted for in the PRA section of the final rule for this function as part of the VFD recordkeeping burden in Table 2, noted as § 558.6(d)(2) (65 FR 76928).[6] FDA continues to believe, as we did in 2000, that medicated feed distributors customarily retain both acknowledgment letters and VFDs as a normal business practice. The purpose of this provision is to clarify that acknowledgment letters, like VFDs, must be retained only for 1 year.

TABLE 3—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

21 U.S.C. 343m 21 CFR Section (Labeling Activity)	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure in hours	Total hours	Total costs
Administrative Review of the Rule, Current VFD Drug Sponsors (General and Operations Managers) [2]	2	1	2	6	12	[2] $1,200
558.6(b)(3) Changes to VFD Form by Drug Sponsors [3]	2	2	4	16	64	[3] 5,308
Veterinarian issues VFD [4]	3,050	245.9	750,000	0.125	93,750	5,550,000
Total					93,826	5,556,508

[1] There are no operating and maintenance costs associated with this collection of information.
[2] Two current drug sponsors times $102 per hour times 6 hours of one-time review time equals approximately $1,200. Estimate rounded to be in accordance with the PRIA.
[3] Two drug sponsors times two VFD forms per respondent equals four changes to the VFD form. With 16 hours per respondent to make form changes and correct Web site, equals 64 total hours to change the VFD forms. NOTE: The hourly and cost burdens to include the revised verbatim statements noted in this document (on the VFD form itself) are exempt under the PRA. We are unable to measure these hours and costs separately, but consider them to be de minimus. The cost to change the VFD form is considered to include these statement changes. Changes to the VFD form for the four approved VFD forms (there are separate VFD forms for each of the two indications per VFD drug) are four VFD forms times $1,327 cost per form equals $5,308.
[4] A total of 3,050 veterinarians times 245.9 VFDs issued per year (on average) times 0.125 hours per form equals 93,750 hours per year times $59 per hour equals approximately $5,550,000. Estimate rounded to be in accordance with the PRIA.

Number of Respondents multiplied by Number of Disclosures per Respondent equals Total Annual Disclosures. Total Annual Disclosures multiplied by Average Burden per Disclosure equals Total Hours.

Additionally, as the usual and customary records of purchase and sales kept by distributors to comply with the cGMP regulations adequately supports the VFD inspection program, we have eliminated the VFD manufacturing recordkeeping requirement currently found in § 558.6(e) and instead refer to the 1-year manufacturing receipt and distribution recordkeeping requirement for medicated feed manufacturers in part 225 (proposed § 558.6(c)(3)). These record requirements are currently found at OMB control number 0910–0152.

Paperwork approval of new animal drug applications is contained under OMB control number 0910–0032, for Indexing of Legally Marketed Unapproved New Animal Drugs for Minor Species under OMB control number 0910–0620, and for veterinary feed directives, OMB approval is contained under OMB control number 0910–0363.

Interested persons are requested to send comments regarding information collection by January 13, 2014 to the Office of Information and Regulatory Affairs, OMB. To ensure that comments on information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the title, ''Veterinary Feed Directives, Reporting, Recordkeeping and Third Party Disclosure.''

In compliance with the PRA (44 U.S.C. 3407(d)), the Agency has submitted the information collection provisions of this proposed rule to OMB for review. These requirements will not be effective until FDA obtains OMB approval. FDA will publish a notice concerning OMB approval of these requirements in the **Federal Register**.

VII. Environmental Impact

The Agency has determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VIII. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the proposed rule, if finalized, would not contain policies that would have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the Agency tentatively concludes that the proposed rule does not contain policies that have federalism implications as defined in the Executive order and, consequently,

[6] The recordkeeping burdens for VFDs and acknowledgement letters were combined because distributors may receive an acknowledgement letter in lieu of a VFD before distributing a medicated feed containing a VFD drug. This combined recordkeeping burden, estimated at 18,788 hours in the 2000 final rule, is still cited in Table 2 of the currently approved Information Collection Request (ICR) for § 558.6 (0910–0363). As noted in the PRA section of the December 2000 final rule, ''[a]ny person who distributes medicated feed containing VFD drugs must file with [FDA] a one-time notification letter of intent to distribute, and retain a copy of each VFD serviced or each consignee's acknowledgment letter for 2 years.'' (65 FR 76928).

a federalism summary impact statement is not required.

IX. Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

List of Subjects

21 CFR Part 514

Administrative practice and procedure, Animal drugs, Confidential business information, Reporting and recordkeeping requirements.

21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR parts 514 and 558 be amended as follows:

PART 514—NEW ANIMAL DRUG APPLICATIONS

■ 1. The authority citation for 21 CFR part 514 is revised to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 354, 356a, 360b, 371, 379e, 381.

■ 2. Amend § 514.1 by revising paragraph (b)(9) to read as follows:

§ 514.1 Applications.

* * * * *

(b) * * *

(9) *Veterinary feed directive.* Three copies of a veterinary feed directive (VFD) must be submitted in the format described under § 558.6(b)(3) of this chapter.

* * * * *

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 3. The authority citation for 21 CFR part 558 is revised to read as follows:

Authority: 21 U.S.C. 354, 360b, 360ccc, 360ccc–1, 371.

■ 4. Amend § 558.3 by revising paragraphs (b)(1)(ii), (b)(6), (b)(7), (b)(9), and (b)(11) and by adding new paragraph (b)(12) to read as follows:

§ 558.3 Definitions and general considerations applicable to this part.

* * * * *

(b) * * *

(1) * * *

(ii) Category II—These drugs require a withdrawal period at the lowest use level for at least one species for which they are approved, or are regulated on a ''no-residue'' basis or with a zero tolerance because of a carcinogenic concern regardless of whether a withdrawal period is required.

* * * * *

(6) A ''veterinary feed directive (VFD) drug'' is a new animal drug approved under section 512(c) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act), conditionally approved under section 571 of the FD&C Act, or listed in the index under section 572 of the FD&C Act, for use in or on animal feed. Use of a VFD drug in or on animal feed must be authorized by a valid veterinary feed directive.

(7) A ''veterinary feed directive'' is a written (nonverbal) statement issued by a licensed veterinarian that orders the use of a VFD drug or combination VFD drug in or on an animal feed. This statement authorizes the client (the owner of the animal or animals or other caretaker) to obtain and use the VFD drug or combination VFD drug in or on an animal feed to treat the client's animals only in accordance with the conditions for use approved, conditionally approved, or indexed by the Food and Drug Administration (FDA). A veterinarian may only issue a VFD for the use of VFD drugs in animals under his or her supervision or oversight in the course of his or her professional practice, and in compliance with all applicable veterinary licensing and practice requirements. A veterinary feed directive may be issued in hardcopy or through electronic media.

* * * * *

(9) For the purposes of this part, a ''distributor'' means any person who consigns a medicated feed containing a VFD drug to another person. Such other person may be another distributor or the client-recipient of a VFD.

* * * * *

(11) An ''acknowledgment letter'' is a written (nonverbal) communication sent to a distributor (consignor) from another distributor (consignee) who is not the ultimate user of the medicated feed containing a VFD drug. An acknowledgment letter may be sent in hardcopy or through electronic media and must affirm:

(i) That the consignee will not ship such medicated animal feed to an animal production facility that does not have a VFD,

(ii) That the consignee will not ship such feed to another distributor without receiving a similar written acknowledgment letter, and

(iii) That the consignee has complied with the distributor notification requirements of § 558.6(c)(4) of this chapter.

(12) A ''combination veterinary feed directive (VFD) drug'' is a combination new animal drug (as defined in § 514.4(c)(1)(i) of this chapter) approved under section 512(c) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act), conditionally approved under section 571 of the FD&C Act, or listed in the index under section 572 of the act, for use in or on animal feed, and at least one of the component new animal drugs is a VFD drug. Use of a combination VFD drug in or on animal feed must be authorized by a valid veterinary feed directive.

■ 5. Revise § 558.6 to read as follows:

§ 558.6 Veterinary feed directive drugs.

(a) General requirements related to veterinary feed directive (VFD) drugs:

(1) A feed containing a VFD drug or a combination VFD drug (a VFD feed or combination VFD feed) shall be fed to animals only by or upon a lawful VFD issued by a licensed veterinarian. A veterinarian may only issue a VFD for the use of VFD drugs in animals under his or her supervision or oversight in the course of his or her professional practice, and in compliance with all applicable veterinary licensing and practice requirements.

(2) VFDs may not be filled after the expiration date on the VFD.

(3) Use and labeling of a VFD drug or a combination VFD drug in feed is limited to the approved, conditionally approved, or indexed conditions of use. Extralabel use (i.e., actual or intended use other than as directed on the labeling) is not permitted.

(4) All involved parties (the veterinarian, the distributor, and the client) must retain a copy of the VFD for 1 year.

(5) All involved parties must make the VFD and any other records specified in this section available for inspection and copying by FDA.

(6) All labeling and advertising for VFD drugs, combination VFD drugs, and feeds containing VFD drugs or combination VFD drugs must prominently and conspicuously display the following cautionary statement: ''Caution: Federal law restricts medicated feed containing this VFD drug to use by or on the order of a licensed veterinarian.''

(b) Responsibilities of the veterinarian issuing the VFD:

(1) The veterinarian must be licensed to practice veterinary medicine and may only issue a VFD for the use of VFD drugs in animals under his or her supervision or oversight in the course of his or her professional practice, and in compliance with all applicable veterinary licensing and practice requirements.

(2) The veterinarian must only issue a VFD that is in compliance with the conditions for use approved, conditionally approved, or indexed for the VFD drug.

(3) The veterinarian must assure that the following information is fully and accurately included on the VFD:

(i) The veterinarian's name, address, and telephone number;

(ii) The client's name, telephone number, and business or home address;

(iii) The premises at which the animals specified in the VFD are located;

(iv) The date of VFD issuance;

(v) The expiration date of the VFD. This date cannot extend beyond the expiration date specified in the approval, conditional approval, or index listing, if such date is specified. In cases where the expiration date is not specified in the approval, conditional approval, or index listing, the expiration date of the VFD cannot exceed 6 months after the date of issuance;

(vi) The name of the animal drug;

(vii) The species and production class of animals to be fed the medicated feed;

(viii) The approximate number of animals to be fed the medicated feed prior to the expiration date on the VFD;

(ix) The indication for which the VFD is issued;

(x) The level of drug in the feed and duration of use;

(xi) The withdrawal time, special instructions, and cautionary statements necessary for use of the drug in conformance with the approval;

(xii) The number of reorders (refills) authorized, if permitted by the drug approval, conditional approval, or index listing;

(xiii) The statement: ''Extralabel use (i.e., use of this VFD feed in a manner other than as directed on the labeling) is not permitted'';

(xiv) An affirmation of intent for combination VFD drugs as described in paragraph (6); and

(xv) The veterinarian's electronic or written signature.

(4) The veterinarian may, at his or her discretion, enter the following information on the VFD to more specifically identify the animals authorized to be treated/fed the medicated feed:

(i) A more specific description of the location of animals (e.g., by site, pen, barn, stall, tank, or other descriptor that the veterinarian deems appropriate);

(ii) The approximate age range of the animals;

(iii) The approximate weight range of the animals; and

(iv) Any other information the veterinarian deems appropriate to identify the animals specified in the VFD.

(5) For VFDs intended to authorize the use of an approved, conditionally approved, or indexed combination VFD drug that includes more than one VFD drug, the veterinarian must include the drug-specific information required in paragraphs (b)(2)(vi), (ix), (x),and (xi) for each component VFD drug in the combination.

(6) The veterinarian may restrict VFD authorization to only include the VFD drug(s) cited on the VFD or such authorization may be expanded to allow the use of the cited VFD drug(s) along with one or more over-the-counter (OTC) animal drugs in an approved, conditionally approved, or indexed combination VFD drug. The veterinarian must affirm his or her intent regarding combination VFD drugs by including one of the following statements on the VFD:

(i) ''The VFD drug(s) cited in this order may not be used in combination with any other animal drugs.''

(ii) ''The VFD drug(s) cited in this order may be used in combination with the following OTC animal drugs to manufacture an FDA-approved, conditionally approved, or indexed combination medicated feed.'' [List OTC drugs immediately following this statement.]

(iii) ''The VFD drug(s) cited in this order may be used in combination with any OTC animal drugs to manufacture an FDA-approved, conditionally approved, or indexed combination medicated feed.''

(7) The veterinarian must send the VFD to the feed distributor via hardcopy, fax, or electronically. If in hardcopy, the veterinarian may send the VFD to the distributor either directly or through the client.

(8) The veterinarian must provide a copy of the VFD to the client.

(9) The veterinarian may not issue a VFD verbally.

(c) Responsibilities of any person who distributes an animal feed containing a VFD drug or a combination VFD drug:

(1) The distributor may only fill a VFD if the VFD contains all the information required in paragraph (b)(3) of this section.

(2) The distributor may only distribute an animal feed containing a VFD drug or combination VFD drug that complies with the terms of the VFD and is manufactured and labeled in conformity with the approved, conditionally approved, or indexed conditions of use for such drug.

(3) In addition to other applicable recordkeeping requirements found in this section, the distributor must also keep VFD feed manufacturing records for 1 year in accordance with part 225 of this chapter. Such records must be made available for inspection and copying by FDA upon request.

(4) A distributor of animal feed containing VFD drugs must notify FDA prior to the first time it distributes animal feed containing VFD drugs. The notification is required one time per distributor and must include the following information:

(i) The distributor's complete name and business address;

(ii) The distributor's signature or the signature of the distributor's authorized agent; and

(iii) The date the notification was signed;

(5) A distributor must also notify FDA within 30 days of any change in ownership, business name, or business address.

(6) The notifications cited in paragraphs (c)(4) and (c)(5) of this section must be submitted to the Food and Drug Administration, Center for Veterinary Medicine, Division of Animal Feeds (HFV–220), 7519 Standish Pl., Rockville, MD 20855. FAX: 240–453–6882.

(7) A distributor may only consign a VFD feed to another distributor if the originating distributor (consignor) first obtains a written (nonverbal) acknowledgment letter, as defined in § 558.3(b)(11), from the receiving distributor (consignee) before the feed is shipped. Consignor distributors must retain a copy of each consignee distributor's acknowledgment letter for 1 year.

Dated: December 9, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–29696 Filed 12–11–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 210

RIN 1510–AB32

Federal Government Participation in the Automated Clearing House

AGENCY: Bureau of the Fiscal Service, Treasury.

ACTION: Notice of proposed rulemaking with request for comment.

SUMMARY: The Department of the Treasury, Bureau of the Fiscal Service (Service) is proposing to amend its regulation governing the use of the Automated Clearing House (ACH) system by Federal agencies. Our regulation adopts, with some exceptions, the NACHA Operating Rules developed by NACHA—The Electronic Payments Association (NACHA) as the rules governing the use of the ACH Network by Federal agencies. We are issuing this proposed rule to address changes that NACHA has made to the NACHA Operating Rules since the publication of NACHA's 2009 ACH Rules book. These changes include amendments set forth in NACHA's 2010, 2011, 2012 and 2013 Operating Rules books.

DATES: Comments on the proposed rule must be received by February 10, 2014.

ADDRESSES: Comments on this rule, identified by docket FISCAL–FMS–2013–0002, should only be submitted using the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions on the Web site for submitting comments.
- *Mail:* Ian Macoy, Bureau of the Fiscal Service, 401 14th Street SW., Room 400B, Washington, DC 20227.

The fax and email methods of submitting comments on rules to the Service have been decommissioned.

Instructions: All submissions received must include the agency name (Bureau of the Fiscal Service) and docket number FISCAL–FMS–2013–0002 for this rulemaking. In general, comments received will be published on Regulations.gov without change, including any business or personal information provided. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not disclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You can download this proposed rule at the following Web site: *http://www.fms.treas.gov/ach.* You may also inspect and copy this proposed rule at: Treasury Department Library, Freedom of Information Act (FOIA) Collection, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue NW., Washington, DC 20220. Before visiting, you must call (202) 622–0990 for an appointment.

In accordance with the U.S. government's eRulemaking Initiative, the Service publishes rulemaking information on *www.regulations.gov.* Regulations.gov offers the public the ability to comment on, search, and view publicly available rulemaking materials, including comments received on rules.

FOR FURTHER INFORMATION CONTACT: Ian Macoy, Supervisory Financial Program Specialist, at (202) 874–6835 or *ian.macoy@fms.treas.gov;* or Natalie H. Diana, Senior Counsel, at (202) 874–6680 or *natalie.diana@fms.treas.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Title 31 CFR part 210 (Part 210) governs the use of the ACH Network by Federal agencies. The ACH Network is a nationwide electronic fund transfer (EFT) system that provides for the inter-bank clearing of electronic credit and debit transactions and for the exchange of payment related information among participating financial institutions. Part 210 incorporates the NACHA Operating Rules, with certain exceptions. From time to time we amend Part 210 in order to address changes that NACHA periodically makes to the NACHA Operating Rules or to revise the regulation as otherwise appropriate.

Currently, Part 210 incorporates the NACHA Operating Rules as set forth in the 2009 NACHA Operating Rules book. NACHA has adopted a number of changes to the NACHA Operating Rules since the publication of the 2009 NACHA Operating Rules book. We are proposing to incorporate in Part 210 most, but not all, of these changes.

We are requesting public comment on all the proposed amendments to Part 210.

II. Summary of Proposed Rule Changes

A. 2010 NACHA Operating Rules Book Changes

1. Authorization and Returns

This NACHA Operating Rules amendment revised the requirements for obtaining a Receiver's authorization for an ACH payment and modified the processes by which Receiving Depository Financial Institutions (RDFIs) handle Receivers' claims of unauthorized debits. Specifically, the amendment (1) clarified the requirements for authorization of ACH entries, adopting the language of Regulation E that an authorization must be ''clear and readily understandable;'' (2) clarified that a purported authorization that is not clear and readily understandable is not considered a valid authorization; (3) eliminated the requirement that Receiver's written statement regarding an unauthorized debit be made under penalty of perjury; (4) established minimum information requirements for and revised timing requirements related to the written statement; and (5) expanded the use of R39 (Improper Source Document) for duplicate check/check conversion payments. We are proposing to accept this amendment.

2. Stop Payments and Regulation E

This amendment revised specific language within the NACHA Operating Rules regarding the application and expiration of a stop payment order so as to re-align the NACHA Operating Rules with the requirements of Regulation E. The amendment (1) eliminated the six-month time period after which a stop payment order placed by a consumer lapses; (2) provided that, where the stop payment order applies to more than one debit entry, the order remains in effect until all such entries have been stopped; (3) provided that RDFIs may require, in cases where the Receiver desires to block all future payments related to a specific authorization/Originator, that the Receiver confirm in writing that the Receiver revoked the authorization; and (4) simplified the description of Return Reason Code R08 (Payment Stopped). We are proposing to accept this amendment.

3. Direct Access Registration

This amendment modified the NACHA Operating Rules to require Originating Depository Financial Institutions (ODFIs) to register their Direct Access status with NACHA, and imposed certain requirements in connection with registration of Direct Access status. We are proposing to accept this amendment.

4. Risk Management and Assessment

This amendment updated the NACHA Operating Rules to codify additional risk management, due diligence and monitoring practices that ODFIs must follow with respect to Originators and Third-Party Senders. We are proposing not to incorporate this amendment in Part 210, since the Federal government's origination of entries through the ACH

Network does not involve the conventional roles of Originator/ODFI and does not present the risks that this amendment seeks to address.

B. 2011 NACHA Operating Rules Book Changes

1. Mobile ACH Payments

This rule established a framework for mobile-initiated ACH debit entries. It expanded the definition of Internet-Initiated Entries (WEB) to include ACH debits authorized or initiated via wireless networks. In addition, it applied all the provisions of the WEB SEC Code to mobile debit entries. The purpose of the rule was to provide clear information on how the NACHA Operating Rules apply to mobile payments and to create a more stable environment within which to develop payment products and services. We are proposing to accept this rule.

2. Elimination of the Opt Out Requirements of ARC and BOC Entries

This amendment eliminated the requirement that Originators of Accounts Receivable Entries (ARC) and Back Office Conversion Entries (BOC) establish and maintain procedures to enable Receivers to opt out of check conversion activity. The amendment reflected the fact that opt out rates were generally 0.1 percent or lower, indicating that consumer concern about check conversion either did not exist or had dissipated over time. We are proposing to accept this amendment.

3. Collection of Return Fees

This rule amendment established a Return Fee Entry as a specific type of ACH entry, to be used only for the purpose of collecting return fees for certain ACH debits to consumer accounts that are returned for insufficient funds or other qualifying checks that are returned NSF/UCF. The rule allows Originators to obtain authorization for a Return Fee Entry by providing the Receiver/check writer with notice that conforms to the requirements of Regulation E.

Part 210 currently provides that agencies with authority to collected returned item services fees may do so by originating an ACH debit entry following notice to the Receiver. We are proposing to accept this rule change, which will enable agencies with authority to collect returned item fees by utilizing the Return Fee Entry.

4. Expanded Use of the XCK Application

This amendment expanded the scope of the Destroyed Check Entry (XCK) application to permit its use for certain damaged checks that cannot be imaged, or for other check images that cannot be processed. The expanded scope allows use of XCK for (1) a check that is missing part of the MICR line but that can be sufficiently repaired to create an ACH debit; (2) a check that, in whole or in part, is unreadable, obscured or mutilated in a manner that prevents automated check processing or creating of an image that may be used to produce a ''substitute check'' under the Check 21 Act, but has an intact MICR line; and (3) a check that does not pass standard quality tests for creation of an image that may be used to produce a substitute check under Check 21. We are proposing to accept this rule change.

5. Recurring TEL

This amendment revised the definition of, and the general rule for, TEL Entries to allow both one-time (Single Entry) and recurring debit Entries authorized orally via the telephone. Prior to the amendment, only Single Entries were permitted to be authorized via the telephone. The amendment expanded the specific authorization language to address authorization requirements for recurring TEL Entries in conformance to the requirements of Regulation E. Under the amendment, authorizations for recurring TEL Entries must meet the writing and signature requirements of Regulation E for preauthorized transfers, which can be done by conforming to the e-Sign Act. We are proposing to accept this rule change.

C. 2012 NACHA Operating Rules Book Changes

1. IAT Modifications and Refinements

Effective September 18, 2009, the NACHA Operating Rules were amended to require ODFIs and Gateway Operators to identify all international payment transactions transmitted via the ACH Network for any portion of the money trail as International ACH Transactions using a new Standard Entry Class Code (IAT). IAT transactions must include the specific data elements defined within the Bank Secrecy Act's (BSA) ''Travel Rule'' so that all parties to the transaction have the information necessary to comply with U.S. law, including the laws administered by OFAC. We accepted the IAT rule for Federal payments, except that we delayed the effective date for certain government transactions and excluded tax payments from the IAT rule.

Since that time, NACHA has made a number of changes clarify and enhance the Rules where appropriate to support more efficient processing of IAT Entries. We are proposing to accept, except as to tax payments, all of these changes, which include the following:

• Minimum Description Standards for IAT Entries

Under the original IAT rule, the RDFI of an inbound IAT Entry to a consumer account was required to provide the consumer with certain descriptive information in accordance with the requirements of the NACHA Operating Rules and Regulation E. With the implementation of IAT, however, the minimum description standards within the NACHA Operating Rules were not modified to explicitly state that IAT Entries also contain information related to terminal city, terminal state, terminal identification code/location, and check serial number for certain types of payments, and that, when such information is present in an IAT Entry, it must be included on the consumer's bank statement. This amendment codified these expectations regarding IAT statement requirements within the NACHA Operating Rules.

• Gateway Notification of Rejected Inbound International Payment

This amendment established a requirement that a Gateway notify the intended RDFI when an inbound international payment has been blocked and/or rejected because the origination of an IAT Entry for such a transaction would violate U.S. law. The amendment requires a Gateway that rejects an inbound payment transaction to provide the intended RDFI with the names and complete addresses of both the Originator and the Receiver, the date of the payment transaction, and the dollar amount of the intended payment. The Gateway must provide such information to the RDFI within five Banking Days of blocking or rejecting the payment.

• Transaction Type Code To Identify Remittances

This amendment expanded the list of code values for use within the Transaction Type Code field in the First IAT Addenda Record to identify international payments originated by a natural person through a remittance product or service. The amendment added a new code for remittances initiated by a natural person to facilitate the identification and tracking of such payments.

• IAT Entries and the Effect of Illegality

This amendment clarified that a Participating Depository Financial Institution (DFI) must process each IAT Entry in accordance with all requirements of the NACHA Operating

Rules. A DFI is excused from its obligation to comply with specific requirements under the NACHA Operating Rules only when the processing of an IAT Entry would cause the DFI to be in violation of U.S. law. The DFI must, therefore, comply with its obligations under the NACHA Operating Rules unless it identifies an IAT as a suspect transaction. For domestic RDFIs that receive inbound IATs, these obligations include the timely provision of funds and the timely transmission of returns.

• Clarification of Rules Exceptions for IAT Entries

This amendment clarified the conditions and circumstances under which specific provisions of the NACHA Operating Rules do not apply to certain IAT Entries. These changes were not substantive in nature, but rather more accurately reflect the application of the provisions to actual IAT processing.

Exceptions for Outbound IAT Entries: This amendment revised, as appropriate, the list of provisions that do not apply to Outbound IAT Entries and clarified that certain functional processes (e.g., Prenotifications, NOCs, reversals, etc.) apply to Outbound IAT Entries only to the extent that they are supported by the laws and payment system rules of the foreign receiving country.

This amendment also incorporated clearer Originator/ODFI obligations with respect to authorization requirements for the origination of Outbound IAT Entries, noting that, while such payments must be authorized under the *Rules,* the form and content of such an authorization are governed by the laws and payment system rules of the foreign receiving country. The amendment also clarified that the Gateway for an Outbound IAT Entry assumes specific responsibilities and warranties of an RDFI, but that the *Rules* do not govern the Gateway's rights and obligations with respect to the foreign Receiver of the Outbound IAT Entry.

Exceptions for Inbound IAT Entries: This amendment incorporated a new subsection that identifies exceptions to the NACHA Operating Rules for Inbound IAT Entries, listing NOCs as applicable to Inbound IAT Entries only to the extent that NOCs are supported by the laws and payment system rules of the foreign originating country. However, because accurate payment information is critical to the successful processing of any ACH Entry (including any IAT Entry), this amendment also requires a Gateway that receives an NOC related to an Inbound IAT to pass the correct payment information to its contact in the foreign country (i.e., the Foreign Gateway or the Originator in the foreign country). Unlike the domestic NOC process, the Gateway (as ODFI) would have no obligation to ensure that future Inbound IAT Entries bear the corrected information.

• Required Gateway Agreements and Authorizations for Outbound IAT Entries

This amendment requires a Gateway to have an agreement in place with either the ODFI or its own customer (i.e., its own account holder or another party) before transmitting Outbound IAT Entries internationally. Similarly, this amendment also requires the Gateway to obtain authorization from either the ODFI or its own customer (whichever has the agreement with the Gateway) to (i) transmit outbound IAT Entries, (ii) arrange for settlement of such Entries with the Foreign Gateway, and (iii) arrange for further transmission of such Entries to the foreign receiving financial institution and settlement of such payments to the foreign Receiver's account. The rule also expands the scope of Return Reason Code R81 (Non-Participant in IAT Program) to facilitate the return of an IAT Entry where these required agreements/authorizations are not in place.

Prior to this amendment, the requirements for these specific agreements and authorizations by a Gateway did not address alternative international payments models in which the Gateway's own account holder or customer (rather than the ODFI) has established an arrangement and entered into an agreement with the Gateway to move funds out of the U.S. for further credit to a foreign account.

• Return of Outbound IAT Entry by Foreign Gateway—Transmission of ACH Return by Gateway to ODFI

This amendment clarified the timeframe for a Gateway to transmit an ACH Return Entry for any Outbound IAT Entry that was properly returned to it by a Foreign Gateway.

• Identification of the Foreign Funding Financial Institution Within an IAT Entry

This amendment revised the descriptions of several fields in the Fourth IAT Addenda Record to clarify that this information, when contained in an Inbound IAT Entry, must identify the foreign financial institution that provides the funding for the transaction.

• Clarification of Originator Identification Field

This amendment revised the description of the Originator Identification Field to address how the field must be populated in various circumstances. Three specific conditions addressed by this change are:

Originators Not Established Under the Laws of a State or the United States: The NACHA Operating Rules require the Originator Identification field to contain an identification number defined by Section 326 of the USA PATRIOT Act for any Originator that is not a natural person and is not established or organized under the laws of a State or the United States. However, the U.S. Treasury has not defined such a numbering scheme, leaving a gap within the *Rules* as to how to identify a foreign Originator within the ACH record. To close this gap, this amendment established the same methodology used in the wire transfer system, which defines the DDA account number at the foreign financial institution as the Originator Identification Number.

Use of Leading Characters as Part of the Originator Identification Number: This change explicitly permits Originators and ODFIs to include a one-digit alphameric code in the first position of the Originator Identification Field to allow for further identification and handling of the payment by the ODFI.

Identification of Third-Party Senders in IAT Entries: This amendment broadened the definition of the Originator Identification Field to permit inclusion of the tax identification number of either the Originator or the Third-Party Sender when the ODFI has the contractual relationship with the Third-Party Sender rather than the Originator of the Entry.

• Return Reason Codes R80–R84: Clarification of Use for Outbound IAT Entries Only

This amendment revised the descriptions of Return Reason Codes R80–R84 (which are used solely by a Gateway) to clarify that these codes are applicable only to Outbound IAT Entries.

• Expansion of Return Reason Code R84 (Entry Not Processed by Gateway Operator)

This amendment broadened the scope of Return Reason Code R84 (Entry Not Processed by Gateway) to accommodate a Gateway's return of an Outbound IAT Entry when it is unable to process the transaction because the payment system in the foreign receiving country does not support a particular rule or function defined as part of the domestic ACH Network.

2. Minor Impact Issues

These NACHA Operating Rules changes include editorial changes to grammar, clarifications of intent, changes that involve minor software modifications and so forth, including the following:

• Modification of the Definition of XCK Ineligible Items

• Clarification of Recurring TEL Authorization Retention Requirements

• Correction to payment Type Code for TEL Entries

• Correction to Definition of Improper ARC and BOC Debit Entries

We are proposing to accept all the foregoing minor impact changes.

3. Risk Management Enhancements

This amendment extended the deadline by which an audit of compliance with the NACHA Operating Rules must be completed. We are proposing not to accept this amendment because the compliance and audit requirements of the NACHA Operating Rules are not incorporated in Part 210.

4. Pain Points in the Rules—Phase Two

• Elimination of WEB Exposure Limits. This amendment removed the requirement that ODFIs establish separate WEB exposure limits for Originators and Third-Party Senders. This amendment does not affect Federal agencies because the WEB exposure limits are not incorporated in Part 210.

• Modification of Accounts Receivable (ARC) Entries to Permit the Conversion of Checks Tendered in Person for the Payment of a Bill at a Manned Location. This amendment modified the scope of the ARC application to permit the conversion of checks tendered in person for the payment of a bill at a manned location. The rule also requires Originators accepting bill payments in this in-person environment to provide a copy of the authorization notice to the Receiver at the time of the transaction. We are proposing to accept this rule change.

D. 2013 NACHA Operating Rules Book Changes

1. IAT Modifications

Several amendments to the IAT rule were enacted in the 2013 NACHA Operating Rules book. We are proposing to adopt all the amendments, as follows:

• Use of Return Reason Code R16 to Identify OFAC-Related Returns

This amendment expanded the title and description of Return Reason Code R16 (Account Frozen) to accommodate this code's use for an RDFI's return of an Entry based on an instruction from OFAC.

• Return Reason Code and Change Code for Gateway Use With Incorrectly-Coded International Payments

This amendment established two new codes—one Return Reason Code and one Change Code—for use by Gateways to advise ODFIs and Originators that funds related to a domestically-coded Entry (i.e., PPD, CCD, etc.) are being moved out of the country and that the Entry should have been formatted as an IAT Entry. LIST NEW CODES The new codes enable the Gateway to process or return the payment, depending on its risk tolerance, while conveying critical payment information back to the ODFI.

• Corrected Data for IAT Entries—NOC Code Descriptions

This amendment corrected the descriptions of Change Codes C04 (Incorrect Individual Name/Receiving Company Name) and C09 (Incorrect Individual Identification Number) as they relate to IAT Entries.

• ODFI Warranties—Compliance With Foreign Payment System Rules

This amendment narrowed the scope of the ODFI warranty of compliance with foreign payment system rules for outbound IAT entries to focus only on authorization of the entry when such authorization is required by the laws or payment system rules of the receiving country.

2. Stop Payments

Effective September 20, 2013, the NACHA Operating Rules will be amended to incorporate two additional conditions under which a stop order relating to a debit entry to a non-Consumer account would lapse. Under the amendment, a stop order would expire if withdrawn by the Receiver or if the debit entry to which the order relates is returned. The amendment, which we are proposing to accept, incorporates current industry practice into the NACHA Operating Rules.

3. Originator Obligations With Respect to Notifications of Change for Single Entries

Effective September 20, 2013, the NACHA Operating Rules will be amended to make optional the Originator's response to Notifications of Change for Single Entry payments. Specifically, Originators will no longer be required to make changes requested within Notifications of Change identified as Single Entry items. We are proposing to accept this amendment.

4. Health Care Payments Via ACH

Effective September 20, 2013, the NACHA Operating Rules will be amended to support health plans' and health care providers' use of the ACH Network by adopting processing enhancements that address requests made by the health care industry, as well as specific transaction identification and formatting requirements for health care claim payments. The amendments operate in combination with health care industry operating rules for electronic funds transfers (EFT) and electronic remittance advice (ERA) developed by the Council on Affordable Quality Healthcare (CAQH) Committee on Operating Rules for Information Exchange (CORE), in collaboration with NACHA, and the designation by the Department of Health and Human Services (HHS) of the CCD entry as the health care EFT standard transaction. Taken together, these sets of rules provide for the efficient and standardized electronic payment of health care claims, and the reassociation of the payments with health care remittance information (''reassociation''), resulting in administrative simplification by health plans and health care providers.

The NACHA Rule amendments will enable financial institutions to be ready to send and receive health care CCD entries for health plans and health care providers, which in turn will be working toward implementation of HHS' January IFC and August IFC by their January 1, 2014 compliance deadline. Originators and ODFIs could begin using the transaction identification and formatting standards within this Rules earlier than the effective date; use of the standards will not cause any processing problems for RDFIs and Receivers. Similarly, RDFIs that do not do so already could begin offering an electronic option for the delivery or provision of payment related information as soon as they are ready.

The five major components of the Health Care EFT rule changes are as follows:

• Unique Identification of Health Care EFTs

• Additional Formatting Requirements for Health Care EFT Transactions

• Delivery of Payment Related Information (Reassociation Number)

- Addition of New EDI Data Segment Terminator
- Health Care Terminology within the *NACHA Operating Rules*

We are proposing to accept all of the NACHA Operating Rules changes related to Health Care EFTs.

5. ACH Security Framework

This amendment to the NACHA Operating Rules created a Security Framework aimed at protecting the security and integrity of certain ACH data throughout its lifecycle. The Security Framework establishes minimum data security obligations for ACH Network participants to protect ACH data within their purview by:

- Requiring non-consumer Originators, Participating DFIs, Third Party Service Providers, and Third-Party Senders to establish, implement, and, as appropriate, update security policies, procedures, and systems related to the initiation, processing, and storage of Entries. These policies, procedures, and systems must:
  - Protect the confidentiality and integrity of Protected Information;
  - Protect against anticipated threats or hazards to the security or integrity of Protected information; and
  - Protect against unauthorized use of Protected Information that could result in substantial harm to a natural person
- Requiring each Participating DFI, Third-Party Service Provider, and Third-Party Sender to verify, as part of its annual ACH Rules Compliance Audit, that it has established, implemented, and updated the data security policies, procedures, and systems required by the Security Requirements rules.
- Requiring ODFIs to use a commercially reasonable method to establish the identity of each non-Consumer Originator or Third-Party Sender with which the ODFI enters into an Origination Agreement.

We are proposing not to accept the Security Framework requirements in Part 210 because Part 210 does not incorporate the rules compliance and audit requirements that the Security Framework expands. Federal agencies are subject to various Federal requirements governing data and systems security and the protection of sensitive information, such that additional NACHA Operating Rules requirements would be unduly burdensome and unnecessary.

6. Data Passing (Risk Management)

This amendment prohibited sharing of certain customer information by Originators, Third-Party Service Providers and ODFIs for the purpose of initiating debit Entries that are not covered by the original authorization. We are proposing to accept this amendment.

7. ODFI Return Rate Reporting (Risk Management)

This amendment reduced the ODFI Return Rate Reporting period from 60 days to 30 days for reducing return rates below the return rate threshold before initiation of a NACHA Operating Rules enforcement proceeding. This amendment does not affect Federal agencies because Part 210 does not incorporate the NACHA Operating Rules enforcement provisions.

8. Incomplete Transactions (Risk Management)

This amendment allows the return of a debit Entry to a Consumer Account within 60 days of the Settlement Date for an ''Incomplete Transaction,'' which is defined as a transaction for which a Third Party Sender debits a consumer's account to collect funds, but does not complete the corresponding payment to the party to which payment is owed. We are proposing to accept this amendment.

III. Section-by-Section Analysis

In order to incorporate in Part 210 the NACHA Rule changes that we are accepting, we are replacing references to the 2009 ACH Rules book with references to the 2013 NACHA Operating Rules and Guidelines book. For those NACHA Rule changes that we are not incorporating (specifically, amendments to the rules enforcement provisions), Part 210 already provides that the rules enforcement provisions of Appendix 11 of the NACHA Operating Rules do not apply to Federal agency ACH transactions. See § 210.2(d)(3) The reference to Appendix 11 is being replaced with a reference to Appendix 10 to reflect numbering changes to the rule.

Sec. 210.2

We are proposing to amend the definition of ''applicable ACH Rules'' at § 210.2(d) to reference the rules published in NACHA's 2013 Rules book rather than the rules published in NACHA's 2009 Rules book. The definition has been updated to reflect the reorganization and renumbering of the NACHA Operating Rules. The changes to the definition are not substantive except:

(1) The deletion of the reference to ACH Rule 2.11.2.3, which required ODFIs to establish exposure limits for Originators of Internet-initiated debit entries. That requirement has been eliminated by NACHA;

(2) The exclusion from the definition of Section 2.2, which generally requires ODFIs to enter into agreements with Originators and Third-Party Senders and perform certain due diligence with respect to those entities; and

(3) The elimination of a temporary exclusion from the IAT rules for debit entries originated by agencies and for certain entries delivered to Mexico, Canada and Panama through the FedGlobal SM ACH Payment Service. Those references have been deleted because the temporary exclusion has now expired.

We are proposing to amend the definition of ''Service'' at § 210.2(p) to reflect the renaming of the Financial Management Service to the Bureau of the Fiscal Service.

Sec. 210.3(b)

We are proposing to amend § 210.3(b) by replacing the references to the ACH Rules as published in the 2009 Rules book with references to the ACH Rules as published in the 2013 NACHA Operating Rules and Guidelines book.

Sec. 210.6

References to ACH Rules 2.2.3, 2.4.5, 2.5.2, 4.2 and 8.7.2 have been replaced by references to Subsections 2.4.4, 2.8.4, 4.3.5, 2.92, 3.2.2, and 3.13.3 to reflect re-numbering of the NACHA Operating Rules.

In subsection (g), references to ACH Rules 2.1.2 and 3.12 have been replaced by references to Subsections 2.3.2.2 and 2.5.10.1 to reflect re-numbering of the NACHA Operating Rules.

Subsection (h), which addressed return item service fees, has been revised. This subsection currently provides that an agency that had authority to collect returned item service fees can do so by originating an ACH debit entry to collect a one-time service fee in connection with an ARC, POP or BOC entry that is returned due to insufficient funds, provided a notice was given to the receiver. Prior to 2011, the NACHA Operating Rules did not permit return item fees to be collected without the receiver's written authorization. In 2011, the NACHA Operating Rules were amended to include a new Entry type, Return Fee Entry, that may be used to collect return fees for certain ACH debits and qualifying checks that are returned NSF, subject to the provision of notice to the Receiver [ACH Rule 2.14]. Subsection (h) is revised to reflect this change.

Sec. 210.8

The references to ACH Rules 2.2.3, 2.4.5, 2.5.2, 4.2, and 8.7.2 have been replaced with references to ACH Rules

Subsections 2.4.4, 2.8.4, 4.8.5, 2.9.2, 3.2.2, and 3.13.3 to reflect re-numbering of the ACH Rules. In addition, the regulatory citation to Regulation E has been updated to reflect its re-codification at 12 CFR Part 1005.

IV. Procedural Analysis

Request for Comment on Plain Language

Executive Order 12866 requires each agency in the Executive branch to write regulations that are simple and easy to understand. We invite comment on how to make the proposed rule clearer. For example, you may wish to discuss: (1) Whether we have organized the material to suit your needs; (2) whether the requirements of the rule are clear; or (3) whether there is something else we could do to make these rule easier to understand.

Regulatory Planning and Review

The proposed rule does not meet the criteria for a ''significant regulatory action'' as defined in Executive Order 12866. Therefore, the regulatory review procedures contained therein do not apply.

Regulatory Flexibility Act Analysis

It is hereby certified that the proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed rule imposes on the Federal government a number of changes that NACHA, The Electronic Payments Association, has already adopted and imposed on private sector entities that utilize the ACH. The proposed rule does not impose any additional burdens, costs or impacts on any private sector entities, including any small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*) is not required.

Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that the agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. We have determined that the proposed rule will not result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, we have not prepared a budgetary impact statement or specifically addressed any regulatory alternatives.

List of Subjects in 31 CFR Part 210

Automated Clearing House, Electronic funds transfer, Financial institutions, Fraud, and Incorporation by reference.

Words of Issuance

For the reasons set out in the preamble, we propose to amend 31 CFR part 210 as follows:

PART 210—FEDERAL GOVERNMENT PARTICIPATION IN THE AUTOMATED CLEARING HOUSE

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 5 U.S.C. 5525; 12 U.S.C. 391; 31 U.S.C. 321, 3301, 3302, 3321, 3332, 3335, and 3720.

■ 2. Revise § 210.2, paragraph (d) to read as follows:

§ 210.2 Definitions.

* * * * *

(d) *Applicable ACH Rules* means the ACH Rules with an effective date on or before September 21, 2013, as published in ''2013 NACHA Operating Rules and Guidelines: A Complete Guide to Rules Governing the ACH Network'' and supplements thereto, except:

(1) Subsections 1.2.2, 1.2.3, 1.2.4, 1.2.5 and 1.2.6; Appendix Seven; Appendix Eight; Appendix Nine and Appendix Ten (governing the enforcement of the ACH Rules, including self-audit requirements, and claims for compensation);

(2) Section 2.10 and Section 3.6 (governing the reclamation of benefit payments);

(3) The requirement in Appendix Three that the Effective Entry Date of a credit entry be no more than two Banking Days following the date of processing by the Originating ACH Operator (see definition of ''Effective Entry Date'' in Appendix Three);

(4) Section 2.2 (setting forth ODFI obligations to enter into agreements with, and perform risk management relating to, Originators and Third-Party Senders) and Section 1.6 (Security Requirements);

(5) Section 2.17 (requiring reporting and reduction of high rates of entries returned as unauthorized); and

(6) The requirements of ACH Rule 2.11 (International ACH Transactions) shall not apply to entries representing the payment of a Federal tax obligation by a taxpayer.

* * * * *

(p) *Service* means the Bureau of the Fiscal Service, Department of the Treasury.

* * * * *

■ 3. Revise § 210.3, paragraph (b) to read as follows:

§ 210.3 Governing law.

* * * * *

(b) *Incorporation by reference—applicable ACH Rules.*

(1) This part incorporates by reference the applicable ACH Rules, including rule changes with an effective date on or before September 21, 2013, as published in the ''2013 NACHA Operating Rules and Guidelines: A Complete Guide to Rules Governing the ACH Network,'' and supplements thereto. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the ''2013 NACHA Operating Rules and Guidelines'' are available from NACHA—The Electronic Payments Association, 13450 Sunrise Valley Drive, Suite 100, Herndon, Virginia 20171. Copies also are available for public inspection at the Office of the Federal Register, 800 North Capitol Street NW., Suite 700, Washington, DC 20002; and the Bureau of the Fiscal Service, 401 14th Street SW., Room 400A, Washington, DC 20227.

(2) Any amendment to the applicable ACH Rules that is approved by NACHA—The Electronic Payments Association after September 21, 2013 shall not apply to Government entries unless the Service expressly accepts such amendment by publishing notice of acceptance of the amendment to this part in the Federal Register. An amendment to the ACH Rules that is accepted by the Service shall apply to Government entries on the effective date of the rulemaking specified by the Service in the **Federal Register** notice expressly accepting such amendment.

■ 4. Revise § 210.6 to read as follows:

§ 210.6 Agencies.

Notwithstanding any provision of the ACH Rules, including Subsections 2.4.4, 2.8.4, 4.3.5, 2.92, 3.2.2, and 3.13.3, agencies shall be subject to the obligations and liabilities set forth in this section in connection with Government entries.

(a) *Receiving entries.* An agency may receive ACH debit or credit entries only with the prior written authorization of the Service.

(b) *Liability to a recipient.* An agency will be liable to the recipient for any loss sustained by the recipient as a result of the agency's failure to originate a credit or debit entry in accordance with this part. The agency's liability shall be limited to the amount of the entry(ies).

(c) *Liability to an originator.* An agency will be liable to an originator or an ODFI for any loss sustained by the originator or ODFI as a result of the agency's failure to credit an ACH entry to the agency's account in accordance with this part. The agency's liability shall be limited to the amount of the entry(ies).

(d) *Liability to an RDFI or ACH association.* Except as otherwise provided in this part, an agency will be liable to an RDFI for losses sustained in processing duplicate or erroneous credit and debit entries originated by the agency. An agency's liability shall be limited to the amount of the entry(ies), and shall be reduced by the amount of the loss resulting from the failure of the RDFI to exercise due diligence and follow standard commercial practices in processing the entry(ies). This section does not apply to credits received by an RDFI after the death or legal incapacity of a recipient of benefit payments or the death of a beneficiary as governed by subpart B of this part. An agency shall not be liable to any ACH association.

(e) *Acquittance of the agency.* The final crediting of the amount of an entry to a recipient's account shall constitute full acquittance of the Federal Government.

(f) *Reversals.* An agency may reverse any duplicate or erroneous entry, and the Federal Government may reverse any duplicate or erroneous file. In initiating a reversal, an agency shall certify to the Service that the reversal complies with applicable law related to the recovery of the underlying payment. An agency that reverses an entry shall indemnify the RDFI as provided in the applicable ACH Rules, but the agency's liability shall be limited to the amount of the entry. If the Federal Government reverses a file, the Federal Government shall indemnify the RDFI as provided in the applicable ACH Rules, but the extent of such liability shall be limited to the amount of the entries comprising the duplicate or erroneous file. Reversals under this section shall comply with the time limitations set forth in the applicable ACH Rules.

(g) *Point-of-purchase debit entries.* An agency may originate a Point-of-Purchase (POP) entry using a check drawn on a consumer or business account and presented at a point-of-purchase. The requirements of ACH Rules Subsections 2.3.2.2 and 2.5.10.1 shall be met for such an entry if the Receiver presents the check at a location where the agency has posted the notice required by the ACH Rules and has provided the Receiver with a copy of the notice.

(h) *Return Fee Entry.* An agency that has authority to collect returned item service fees may do so by originating a Return Fee Entry if the agency provides notice to the Receiver in accordance with the ACH Rules.''

■ 5. Amend § 210.8 by revising paragraphs (a) and (b) to read as follows:

§ 210.8 Financial institutions.

(a) *Status as a Treasury depositary.* The origination or receipt of an entry subject to this part does not render a financial institution a Treasury depositary. A financial institution shall not advertise itself as a Treasury depositary on such basis.

(b) *Liability.* Notwithstanding ACH Rules Subsections 2.4.4, 2.8.4, 4.8.5, 2.9.2, 3.2.2, and 3.13.3, if the Federal Government sustains a loss as a result of a financial institution's failure to handle an entry in accordance with this part, the financial institution shall be liable to the Federal Government for the loss, up to the amount of the entry, except as otherwise provided in this section. A financial institution shall not be liable to any third party for any loss or damage resulting directly or indirectly from an agency's error or omission in originating an entry. Nothing in this section shall affect any obligation or liability of a financial institution under Regulation E, 12 CFR part 1005, or the Electronic Funds Transfer Act, 12 U.S.C. 1693 et seq.

* * * * *

Dated: December 3, 2013.

Richard L. Gregg,

Fiscal Assistant Secretary.

[FR Doc. 2013–29202 Filed 12–11–13; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2013–0200, 0630, 0632, 0633, 0634, 0635, 0637, 0638, and 0639; FRL–9903–90–OSWER]

National Priorities List, Proposed Rule No. 59

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA'' or ''the Act''), as amended, requires that the National Oil and Hazardous Substances Pollution Contingency Plan (''NCP'') include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants or contaminants throughout the United States. The National Priorities List (''NPL'') constitutes this list. The NPL is intended primarily to guide the Environmental Protection Agency (''EPA'' or ''the agency'') in determining which sites warrant further investigation. These further investigations will allow the EPA to assess the nature and extent of public health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. This rule proposes to add eight sites to the NPL, all to the General Superfund Section. This proposed rule also solicits additional comments on the Smurfit-Stone Mill site based on additional references to the site's Hazard Ranking System (HRS) documentation record being made available to the public.

DATES: Comments regarding any of these proposed listings must be submitted (postmarked) on or before February 10, 2014.

Comments regarding the additional Smurfit-Stone Mill reference material available for review must be submitted (postmarked) on or before January 13, 2014.

ADDRESSES: Identify the appropriate Docket Number from the table below.

DOCKET IDENTIFICATION NUMBERS BY SITE

Site name	City/county, state	Docket ID No.
Macmillan Ring Free Oil	Norphlet, AR	EPA–HQ–SFUND–2013–0630
Keddy Mill	Windham, ME	EPA–HQ–SFUND–2013–0632
Smurfit-Stone Mill	Missoula, MT	EPA–HQ–SFUND–2013–0200
PCE Southeast Contamination	York, NE	EPA–HQ–SFUND–2013–0633

DOCKET IDENTIFICATION NUMBERS BY SITE—Continued

Site name	City/county, state	Docket ID No.
PCE/TCE Northeast Contamination	York, NE	EPA–HQ–SFUND–2013–0634
Troy Chem Corp Inc	Newark, NJ	EPA–HQ–SFUND–2013–0635
Unimatic Manufacturing Corporation	Fairfield, NJ	EPA–HQ–SFUND–2013–0637
Wolff-Alport Chemical Company	Ridgewood, NY	EPA–HQ–SFUND–2013–0638
Walker Machine Products, Inc	Collierville, TN	EPA–HQ–SFUND–2013–0639

Submit your comments, identified by the appropriate Docket number, by one of the following methods:

• *www.regulations.gov:* Follow the online instructions for submitting comments.

• *Email: superfund.docket@epa.gov.*

• *Mail:* Mail comments (no facsimiles or tapes) to Docket Coordinator, Headquarters; U.S. Environmental Protection Agency; CERCLA Docket Office; (Mailcode 5305T); 1200 Pennsylvania Avenue NW., Washington, DC 20460.

• *Hand Delivery or Express Mail:* Send comments (no facsimiles or tapes) to Docket Coordinator, Headquarters; U.S. Environmental Protection Agency; CERCLA Docket Office; 1301 Constitution Avenue NW., William Jefferson Clinton Building West, Room 3334, Washington, DC 20004. Such deliveries are accepted only during the Docket's normal hours of operation (8:30 a.m. to 4:30 p.m., Monday through Friday, excluding federal holidays).

Instructions: Direct your comments to the appropriate Docket number (see table above). The EPA's policy is that all comments received will be included in the public Docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system; that means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public Docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional Docket addresses and further details on their contents, see section II, ''Public Review/Public Comment,'' of the **SUPPLEMENTARY INFORMATION** portion of this preamble.

FOR FURTHER INFORMATION CONTACT: Terry Jeng, phone: (703) 603–8852, email: *jeng.terry@epa.gov,* Site Assessment and Remedy Decisions Branch, Assessment and Remediation Division, Office of Superfund Remediation and Technology Innovation (Mailcode 5204P), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; or the Superfund Hotline, phone (800) 424–9346 or (703) 412–9810 in the Washington, DC, metropolitan area.

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I. Background

A. What are CERCLA and SARA?

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601–9675 (''CERCLA'' or ''the Act''), in response to the dangers of uncontrolled releases or threatened releases of hazardous substances, and releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. CERCLA was amended on October 17, 1986, by the Superfund Amendments and Reauthorization Act (''SARA''), Public Law 99–499, 100 Stat. 1613 *et seq.*

B. What is the NCP?

To implement CERCLA, the EPA promulgated the revised National Oil and Hazardous Substances Pollution Contingency Plan (''NCP''), 40 CFR Part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP sets guidelines and procedures for responding to releases and threatened releases of hazardous substances or releases or substantial threats of releases into the environment of any pollutant or contaminant that may present an imminent or substantial danger to the public health or welfare. The EPA has revised the NCP on several occasions. The most recent comprehensive revision was on March 8, 1990 (55 FR 8666).

As required under section 105(a)(8)(A) of CERCLA, the NCP also includes ''criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action.'' ''Removal'' actions are defined broadly and include a wide range of actions taken to study, clean up, prevent or otherwise address releases and threatened releases of hazardous substances, pollutants or contaminants (42 U.S.C. 9601(23)).

C. What is the National Priorities List (NPL)?

The NPL is a list of national priorities among the known or threatened releases of hazardous substances, pollutants or contaminants throughout the United States. The list, which is appendix B of the NCP (40 CFR Part 300), was required under section 105(a)(8)(B) of CERCLA, as amended. Section 105(a)(8)(B) defines the NPL as a list of ''releases'' and the highest priority ''facilities'' and requires that the NPL be revised at least annually. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances, pollutants or contaminants. The NPL is only of limited significance, however, as it does not assign liability to any party or to the owner of any specific property. Also, placing a site on the NPL does not mean that any remedial or removal action necessarily need be taken.

For purposes of listing, the NPL includes two sections, one of sites that are generally evaluated and cleaned up by the EPA (the ''General Superfund Section''), and one of sites that are owned or operated by other federal agencies (the ''Federal Facilities Section''). With respect to sites in the Federal Facilities Section, these sites are generally being addressed by other federal agencies. Under Executive Order 12580 (52 FR 2923, January 29, 1987) and CERCLA section 120, each federal agency is responsible for carrying out most response actions at facilities under its own jurisdiction, custody or control, although the EPA is responsible for preparing a Hazard Ranking System (''HRS'') score and determining whether the facility is placed on the NPL.

D. How are sites listed on the NPL?

There are three mechanisms for placing sites on the NPL for possible remedial action (see 40 CFR 300.425(c) of the NCP): (1) A site may be included on the NPL if it scores sufficiently high on the HRS, which the EPA promulgated as appendix A of the NCP (40 CFR Part 300). The HRS serves as a screening tool to evaluate the relative potential of uncontrolled hazardous substances, pollutants or contaminants to pose a threat to human health or the environment. On December 14, 1990 (55 FR 51532), the EPA promulgated revisions to the HRS partly in response to CERCLA section 105(c), added by SARA. The revised HRS evaluates four pathways: ground water, surface water, soil exposure and air. As a matter of agency policy, those sites that score 28.50 or greater on the HRS are eligible for the NPL. (2) Pursuant to 42 U.S.C. 9605(a)(8)(B), each state may designate a single site as its top priority to be listed on the NPL, without any HRS score. This provision of CERCLA requires that, to the extent practicable, the NPL include one facility designated by each state as the greatest danger to public health, welfare or the environment among known facilities in the state. This mechanism for listing is set out in the NCP at 40 CFR 300.425(c)(2). (3) The third mechanism for listing, included in the NCP at 40 CFR 300.425(c)(3), allows certain sites to be listed without any HRS score, if all of the following conditions are met:

- The Agency for Toxic Substances and Disease Registry (ATSDR) of the U.S. Public Health Service has issued a health advisory that recommends dissociation of individuals from the release.
- The EPA determines that the release poses a significant threat to public health.
- The EPA anticipates that it will be more cost-effective to use its remedial authority than to use its removal authority to respond to the release.

The EPA promulgated an original NPL of 406 sites on September 8, 1983 (48 FR 40658) and generally has updated it at least annually.

E. What happens to sites on the NPL?

A site may undergo remedial action financed by the Trust Fund established under CERCLA (commonly referred to as the ''Superfund'') only after it is placed on the NPL, as provided in the NCP at 40 CFR 300.425(b)(1). (''Remedial actions'' are those ''consistent with permanent remedy, taken instead of or in addition to removal actions. . . .'' 42 U.S.C. 9601(24).) However, under 40 CFR 300.425(b)(2) placing a site on the NPL ''does not imply that monies will be expended.'' The EPA may pursue other appropriate authorities to respond to the releases, including enforcement action under CERCLA and other laws.

F. Does the NPL define the boundaries of sites?

The NPL does not describe releases in precise geographical terms; it would be neither feasible nor consistent with the limited purpose of the NPL (to identify releases that are priorities for further evaluation), for it to do so. Indeed, the precise nature and extent of the site are typically not known at the time of listing.

Although a CERCLA ''facility'' is broadly defined to include any area where a hazardous substance has ''come to be located'' (CERCLA section 101(9)), the listing process itself is not intended to define or reflect the boundaries of such facilities or releases. Of course, HRS data (if the HRS is used to list a site) upon which the NPL placement was based will, to some extent, describe the release(s) at issue. That is, the NPL site would include all releases evaluated as part of that HRS analysis.

When a site is listed, the approach generally used to describe the relevant release(s) is to delineate a geographical area (usually the area within an installation or plant boundaries) and identify the site by reference to that area. However, the NPL site is not necessarily coextensive with the boundaries of the installation or plant, and the boundaries of the installation or plant are not necessarily the ''boundaries'' of the site. Rather, the site consists of all contaminated areas within the area used to identify the site, as well as any other location where that contamination has come to be located, or from where that contamination came.

In other words, while geographic terms are often used to designate the site (e.g., the ''Jones Co. plant site'') in terms of the property owned by a particular party, the site, properly understood, is not limited to that property (e.g., it may extend beyond the property due to contaminant migration), and conversely may not occupy the full extent of the property (e.g., where there are uncontaminated parts of the identified property, they may not be, strictly speaking, part of the ''site''). The ''site'' is thus neither equal to, nor confined by, the boundaries of any specific property that may give the site its name, and the name itself should not be read to imply that this site is coextensive with the entire area within the property boundary of the installation or plant. In addition, the site name is merely used to help identify the geographic location of the contamination, and is not meant to constitute any determination of liability at a site. For example, the name ''Jones Co. plant site,'' does not imply that the Jones Company is responsible for the contamination located on the plant site.

The EPA regulations provide that the Remedial Investigation (''RI'') ''is a process undertaken . . . to determine the nature and extent of the problem presented by the release'' as more information is developed on site contamination, and which is generally performed in an interactive fashion with the Feasibility Study (''FS'') (40 CFR 300.5). During the RI/FS process, the release may be found to be larger or smaller than was originally thought, as more is learned about the source(s) and the migration of the contamination. However, the HRS inquiry focuses on an evaluation of the threat posed and therefore the boundaries of the release need not be exactly defined. Moreover, it generally is impossible to discover the full extent of where the contamination ''has come to be located'' before all necessary studies and remedial work are completed at a site. Indeed, the known boundaries of the contamination can be expected to change over time. Thus, in most cases, it may be impossible to describe the boundaries of a release with absolute certainty.

Further, as noted above, NPL listing does not assign liability to any party or to the owner of any specific property. Thus, if a party does not believe it is liable for releases on discrete parcels of property, it can submit supporting information to the agency at any time after it receives notice it is a potentially responsible party.

For these reasons, the NPL need not be amended as further research reveals more information about the location of the contamination or release.

G. How are sites removed from the NPL?

The EPA may delete sites from the NPL where no further response is appropriate under Superfund, as explained in the NCP at 40 CFR 300.425(e). This section also provides that the EPA shall consult with states on proposed deletions and shall consider whether any of the following criteria have been met:

(i) Responsible parties or other persons have implemented all appropriate response actions required;

(ii) All appropriate Superfund-financed response has been implemented and no further response action is required; or

(iii) The remedial investigation has shown the release poses no significant threat to public health or the environment, and taking of remedial measures is not appropriate.

H. May the EPA delete portions of sites from the NPL as they are cleaned up?

In November 1995, the EPA initiated a policy to delete portions of NPL sites where cleanup is complete (60 FR 55465, November 1, 1995). Total site cleanup may take many years, while portions of the site may have been cleaned up and made available for productive use.

I. What is the Construction Completion List (CCL)?

The EPA also has developed an NPL construction completion list (''CCL'') to simplify its system of categorizing sites and to better communicate the successful completion of cleanup activities (58 FR 12142, March 2, 1993). Inclusion of a site on the CCL has no legal significance.

Sites qualify for the CCL when: (1) Any necessary physical construction is complete, whether or not final cleanup levels or other requirements have been achieved; (2) the EPA has determined that the response action should be limited to measures that do not involve construction (e.g., institutional controls); or (3) the site qualifies for deletion from the NPL. For the most up-to-date information on the CCL, see the EPA's Internet site at *http://www.epa.gov/superfund/cleanup/ccl.htm*.

J. What is the sitewide ready for anticipated use measure?

The Sitewide Ready for Anticipated Use measure (formerly called Sitewide Ready-for-Reuse) represents important Superfund accomplishments and the measure reflects the high priority the EPA places on considering anticipated future land use as part of the remedy selection process. See Guidance for Implementing the Sitewide Ready-for-Reuse Measure, May 24, 2006, OSWER 9365.0–36. This measure applies to final and deleted sites where construction is complete, all cleanup goals have been achieved, and all institutional or other controls are in place. The EPA has been successful on many occasions in carrying out remedial actions that ensure protectiveness of human health and the environment for current and future land uses, in a manner that allows contaminated properties to be restored to environmental and economic vitality. For further information, please go to *http://www.epa.gov/superfund/programs/recycle/pdf/sitewide_a.pdf*.

K. What is state/tribal correspondence concerning NPL Listing?

In order to maintain close coordination with states and tribes in the NPL listing decision process, the EPA's policy is to determine the position of the states and tribes regarding sites that the EPA is considering for listing. This consultation process is outlined in two memoranda that can be found at the following Web site: *http://www.epa.gov/superfund/sites/npl/hrsres/policy/govlet.pdf*. The EPA is improving the transparency of the process by which state and tribal input is solicited. The EPA will be using the Web and where appropriate more structured state and tribal correspondence that (1) Explains the concerns at the site and the EPA's rationale for proceeding; (2) requests an explanation of how the state intends to address the site if placement on the NPL is not favored; and (3) emphasizes the transparent nature of the process by informing states that information on their responses will be publicly available.

A model letter and correspondence from this point forward between the EPA and states and tribes where applicable, is available on the EPA's

Web site at *http://www.epa.gov/superfund/sites/query/queryhtm/nplstcor.htm*.

II. Public Review/Public Comment

A. May I review the documents relevant to this proposed rule?

Yes, documents that form the basis for the EPA's evaluation and scoring of the sites in this proposed rule are contained in public Dockets located both at the EPA Headquarters in Washington, DC, and in the Regional offices. These documents are also available by electronic access at *www.regulations.gov* (see instructions in the **ADDRESSES** section above).

B. How do I access the documents?

You may view the documents, by appointment only, in the Headquarters or the Regional Dockets after the publication of this proposed rule. The hours of operation for the Headquarters Docket are from 8:30 a.m. to 4:30 p.m., Monday through Friday excluding federal holidays. Please contact the Regional Dockets for hours.

The following is the contact information for the EPA Headquarters Docket: Docket Coordinator, Headquarters, U.S. Environmental Protection Agency, CERCLA Docket Office, 1301 Constitution Avenue NW., William Jefferson Clinton Building West, Room 3334, Washington, DC 20004; 202/566–0276. (Please note this is a visiting address only. Mail comments to the EPA Headquarters as detailed at the beginning of this preamble.)

The contact information for the Regional Dockets is as follows:

- Holly Inglis, Region 1 (CT, ME, MA, NH, RI, VT), U.S. EPA, Superfund Records and Information Center, 5 Post Office Square, Suite 100, Boston, MA 02109–3912; 617/918–1413.
- Ildefonso Acosta, Region 2 (NJ, NY, PR, VI), U.S. EPA, 290 Broadway, New York, NY 10007–1866; 212/637–4344.
- Lorie Baker (ASRC), Region 3 (DE, DC, MD, PA, VA, WV), U.S. EPA, Library, 1650 Arch Street, Mailcode 3HS12, Philadelphia, PA 19103; 215/814–3355.
- Jennifer Wendel, Region 4 (AL, FL, GA, KY, MS, NC, SC, TN), U.S. EPA, 61 Forsyth Street, SW., Mailcode 9T25, Atlanta, GA 30303; 404/562–8799.
- Todd Quesada, Region 5 (IL, IN, MI, MN, OH, WI), U.S. EPA Superfund Division Librarian/SFD Records Manager SRC–7J, Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, IL 60604; 312/886–4465.
- Brenda Cook, Region 6 (AR, LA, NM, OK, TX), U.S. EPA, 1445 Ross Avenue, Suite 1200, Mailcode 6SFTS, Dallas, TX 75202–2733; 214/665–7436.
- Michelle Quick, Region 7 (IA, KS, MO, NE), U.S. EPA, 11201 Renner Blvd., Mailcode SUPRERNB, Lenexa, KS 66219; 913/551–7335.
- Sabrina Forrest, Region 8 (CO, MT, ND, SD, UT, WY), U.S. EPA, 1595 Wynkoop Street, Mailcode 8EPR–B, Denver, CO 80202–1129; 303/312–6484.
- Sharon Murray, Region 9 (AZ, CA, HI, NV, AS, GU, MP), U.S. EPA, 75 Hawthorne Street, Mailcode SFD 6–1, San Francisco, CA 94105; 415/947–4250.
- Ken Marcy, Region 10 (AK, ID, OR, WA), U.S. EPA, 1200 6th Avenue, Mailcode ECL–112, Seattle, WA 98101; 206/463–1349.

You may also request copies from the EPA Headquarters or the Regional Dockets. An informal request, rather than a formal written request under the Freedom of Information Act, should be the ordinary procedure for obtaining copies of any of these documents. Please note that due to the difficulty of reproducing oversized maps, oversized maps may be viewed only in-person; since the EPA dockets are not equipped to either copy and mail out such maps or scan them and send them out electronically.

You may use the Docket at *www.regulations.gov* to access documents in the Headquarters Docket (see instructions included in the **ADDRESSES** section above). Please note that there are differences between the Headquarters Docket and the Regional Dockets and those differences are outlined below.

C. What documents are available for public review at the headquarters docket?

The Headquarters Docket for this proposed rule contains the following for the sites proposed in this rule: HRS score sheets; Documentation Records describing the information used to compute the score; information for any sites affected by particular statutory requirements or the EPA listing policies; and a list of documents referenced in the Documentation Record.

D. What documents are available for public review at the regional dockets?

The Regional Dockets for this proposed rule contain all of the information in the Headquarters Docket plus the actual reference documents containing the data principally relied upon and cited by the EPA in calculating or evaluating the HRS score for the sites. These reference documents are available only in the Regional Dockets.

E. How do I submit my comments?

Comments must be submitted to the EPA Headquarters as detailed at the beginning of this preamble in the **ADDRESSES** section. Please note that the mailing addresses differ according to method of delivery. There are two different addresses that depend on whether comments are sent by express mail or by postal mail.

F. What happens to my comments?

The EPA considers all comments received during the comment period. Significant comments are typically addressed in a support document that the EPA will publish concurrently with the **Federal Register** document if, and when, the site is listed on the NPL.

G. What should I consider when preparing my comments?

Comments that include complex or voluminous reports, or materials prepared for purposes other than HRS scoring, should point out the specific information that the EPA should consider and how it affects individual HRS factor values or other listing criteria (*Northside Sanitary Landfill* v. *Thomas,* 849 F.2d 1516 (D.C. Cir. 1988)). The EPA will not address voluminous comments that are not referenced to the HRS or other listing criteria. The EPA will not address comments unless they indicate which component of the HRS documentation record or what particular point in the EPA's stated eligibility criteria is at issue.

H. May I submit comments after the public comment period is over?

Generally, the EPA will not respond to late comments. The EPA can guarantee only that it will consider those comments postmarked by the close of the formal comment period. The EPA has a policy of generally not delaying a final listing decision solely to accommodate consideration of late comments.

I. May I view public comments submitted by others?

During the comment period, comments are placed in the Headquarters Docket and are available to the public on an ''as received'' basis. A complete set of comments will be available for viewing in the Regional Dockets approximately one week after the formal comment period closes.

All public comments, whether submitted electronically or in paper form, will be made available for public viewing in the electronic public Docket at *www.regulations.gov http://www/epa/goc/edocket* as the EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Once in the public Dockets system, select ''search,'' then key in the appropriate Docket ID number.

J. May I submit comments regarding sites not currently proposed to the NPL?

In certain instances, interested parties have written to the EPA concerning sites that were not at that time proposed to the NPL. If those sites are later proposed to the NPL, parties should review their earlier concerns and, if still appropriate, resubmit those concerns for consideration during the formal comment period. Site-specific correspondence received prior to the period of formal proposal and comment will not generally be included in the Docket.

III. Contents of This Proposed Rule

A. Proposed Additions to the NPL

In today's proposed rule, the EPA is proposing to add eight sites to the NPL, all to the General Superfund section. All of the sites in this proposed rulemaking are being proposed based on HRS scores of 28.50 or above.

The sites are presented in the table below.

General Superfund section:

State	Site name	City/county
AR	Macmillan Ring Free Oil	Norphlet.
ME	Keddy Mill	Windham.
NE	PCE Southeast Contamination	York.
NE	PCE/TCE Northeast Contamination	York.
NJ	Troy Chem Corp Inc	Newark.
NJ	Unimatic Manufacturing Corporation	Fairfield.
NY	Wolff-Alport Chemical Company	Ridgewood.
TN	Walker Machine Products, Inc.	Collierville.

B. Additional Comments Being Accepted on the Smurfit-Stone Mill Site Based on New References Added to the HRS Documentation Record

For the Smurfit-Stone Mill site, proposed May 24, 2013 (78 FR 31464), one commenter claimed several documents not available for review in the docket during the public comment period should have been available. Specifically, the commenter noted that the Analytical Results Report (ARR) includes the statement that ''[t]his ARR is intended to be read in conjunction with the Smurfit-Stone Mill Preliminary Assessment (PA) (UOS 2011a), the Smurfit-Stone Mill Field Sampling Plan (FSP) (UOS 2011b), and the Smurfit-Stone Mill Sampling Activities Report (SAR) (UOS 2011c).'' The ARR (Reference 5 to the HRS documentation record at proposal) is the report of a large sampling investigation (the combined Site Inspection/Remedial Investigation or SI/RA) encompassing the site and vicinity; it serves as the primary source of site and analytical data supporting the HRS scoring, equivalent to an Expanded Site Investigation. The commenter also stated that ''the laboratory analytical reports associated with the ARR were not available for review . . .''

The EPA has examined this issue and decided to make several documents available as references to the HRS documentation record. These additional references are the FSP for the Combined SI/RA, the SAR, and the laboratory analytical reports. The PA was available for review during the comment period; it is reference 48 to the documentation record at proposal

The EPA is providing these three additional references for public review and comment. They are available at the regional office in Denver. Anyone wishing to comment on information in these references and the impact this has on the HRS score for the proposed Smurfit-Stone Mill site should do so within the next 30 calendar days (see **DATES** section at the beginning of this notice). Additional comments will not be accepted on other HRS scoring issues which could have appropriately been raised during the original comment period and are not based on information provided in these additional references.

Please contact Sabrina Forrest at (303) 312–6484 if you are interested in either arranging a time to review these additional documents or receiving electronic copies of the documents. Comments should be submitted pursuant to instructions in the **ADDRESSEES** section of this preamble; they may be submitted electronically, by mail or by express mail. The docket number for this site is EPA–HQ–SFUND–2013–0200 and should be identified in any correspondence/electronic submission.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

1. What is Executive Order 12866?

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the agency must determine whether a regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety or state, local or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities or the principles set forth in the Executive Order.

2. Is this proposed rule subject to Executive Order 12866 review?

No. The listing of sites on the NPL does not impose any obligations on any entities. The listing does not set standards or a regulatory regime and imposes no liability or costs. Any liability under CERCLA exists irrespective of whether a site is listed. It has been determined that this action is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

1. What is the Paperwork Reduction Act?

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et* *seq.,* an agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under the PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations, after initial display in the preamble of the final rules, are listed in 40 CFR Part 9.

2. Does the Paperwork Reduction Act apply to this proposed rule?

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The EPA has determined that the PRA does not apply because this rule does not contain any information collection requirements that require approval of the OMB.

Burden means the total time, effort or financial resources expended by persons to generate, maintain, retain or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install and utilize technology and systems for the purposes of collecting, validating and verifying information, processing and maintaining information and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR Part 9.

C. Regulatory Flexibility Act

1. What is the Regulatory Flexibility Act?

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations and small governmental jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

2. How has the EPA complied with the regulatory flexibility act?

This proposed rule listing sites on the NPL, if promulgated, would not impose any obligations on any group, including small entities. This proposed rule, if promulgated, also would establish no standards or requirements that any small entity must meet, and would impose no direct costs on any small entity. Whether an entity, small or otherwise, is liable for response costs for a release of hazardous substances depends on whether that entity is liable under CERCLA 107(a). Any such liability exists regardless of whether the site is listed on the NPL through this rulemaking. Thus, this proposed rule, if promulgated, would not impose any requirements on any small entities. For the foregoing reasons, I certify that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

1. What is the Unfunded Mandates Reform Act (UMRA)?

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local and tribal governments and the private sector. Under section 202 of the UMRA, the EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "federal mandates" that may result in expenditures by state, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Before the EPA promulgates a rule where a written statement is needed, section 205 of the UMRA generally requires the EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows the EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before the EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates and informing, educating and advising small governments on compliance with the regulatory requirements.

2. Does UMRA apply to this proposed rule?

This proposed rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local and tribal governments, in the aggregate, or the private sector in any one year. Proposing a site on the NPL does not itself impose any costs. Proposal does not mean that the EPA necessarily will undertake remedial action. Nor does proposal require any action by a private party or determine liability for response costs. Costs that arise out of site responses result from site-specific decisions regarding what actions to take, not directly from the act of proposing a site to be placed on the NPL. Thus, this rule is not subject to the requirements of section 202 and 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As is mentioned above, site proposal does not impose any costs and would not require any action of a small government.

E. Executive Order 13132: Federalism

1. What is Executive Order 13132?

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires the EPA to develop an accountable process to ensure "meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."

2. Does Executive Order 13132 apply to this proposed rule?

This proposed rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it does not contain any requirements applicable to states or other levels of government. Thus, the requirements of the Executive Order do not apply to this proposed rule.

The EPA believes, however, that this proposed rule may be of significant interest to state governments. In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA therefore consulted with state officials and/or representatives of state governments early in the process of developing the rule to permit them to have meaningful and timely input into its development. All sites included in this proposed rule were referred to the EPA by states for listing. For all sites in this rule, the EPA received letters of support either from the governor or a state official who was delegated the authority by the governor to speak on their behalf regarding NPL listing decisions.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

1. What is Executive Order 13175?

Executive Order 13175, entitled ‘‘Consultation and Coordination with Indian Tribal Governments’’ (65 FR 67249, November 6, 2000), requires the EPA to develop an accountable process to ensure ‘‘meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.’’ ‘‘Policies that have tribal implications’’ are defined in the Executive Order to include regulations that have ‘‘substantial direct effects on one or more Indian tribes, on the relationship between the federal government and the Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.’’

2. Does Executive Order 13175 apply to this proposed rule?

This action does not have tribal implications, as specified in Executive Order 13175. Proposing a site to the NPL does not impose any costs on a tribe or require a tribe to take remedial action. Thus, Executive Order 13175 does not apply to this proposed rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

1. What is Executive Order 13045?

Executive Order 13045: ‘‘Protection of Children From Environmental Health Risks and Safety Risks’’ (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ‘‘economically significant’’ as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that the EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency.

2. Does Executive Order 13045 apply to this proposed rule?

This proposed rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because the agency does not have reason to believe the environmental health or safety risks addressed by this proposed rule present a disproportionate risk to children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

1. What is Executive Order 13211?

Executive Order 13211, ‘‘Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,’’ (66 FR 28355, May 22, 2001) requires federal agencies to prepare a ‘‘Statement of Energy Effects’’ when undertaking certain regulatory actions. A Statement of Energy Effects describes the adverse effects of a ‘‘significant energy action’’ on energy supply, distribution and use, reasonable alternatives to the action and the expected effects of the alternatives on energy supply, distribution and use.

2. Does Executive Order 13211 apply to this proposed rule?

This action is not a ‘‘significant energy action’’ as defined in Executive Order 13211, because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. Further, the agency has concluded that this rule is not likely to have any adverse energy impacts because proposing a site to the NPL does not require an entity to conduct any action that would require energy use, let alone that which would significantly affect energy supply, distribution or usage. Thus, Executive Order 13211 does not apply to this action.

I. National Technology Transfer and Advancement Act

1. What is the National Technology Transfer and Advancement Act?

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

2. Does the National Technology Transfer and Advancement Act apply to this proposed rule?

No. This proposed rulemaking does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

1. What is Executive Order 12898?

Executive Order (EO) 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

2. Does Executive Order 12898 apply to this proposed rule?

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. As this rule does not impose any enforceable duty upon state, tribal or local governments, this rule will neither increase nor decrease environmental protection.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Dated: November 27, 2013.

Mathy Stanislaus,

Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 2013–29349 Filed 12–11–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2013–0002; Internal Agency Docket No. FEMA–B–1147]

Proposed Flood Elevation Determinations for Fayette County, Pennsylvania (All Jurisdictions)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule; withdrawal.

SUMMARY: The Federal Emergency Management Agency (FEMA) is withdrawing its proposed rule concerning proposed flood elevation determinations for Fayette County, Pennsylvania (All Jurisdictions).

DATES: This withdrawal is effective on December 12, 2013.

ADDRESSES: You may submit comments, identified by Docket No. FEMA–B–1147 to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: On October 5, 2010, FEMA published a proposed rulemaking at 75 FR 61377, proposing flood elevation determinations along one or more flooding sources in Fayette County, Pennsylvania. Because FEMA has or will be issuing a Revised Preliminary Flood Insurance Rate Map, and if necessary a Flood Insurance Study report, featuring updated flood hazard information, the proposed rulemaking is being withdrawn. A Notice of Proposed Flood Hazard Determinations will be published in the **Federal Register** and in the affected community's local newspaper.

Authority: 42 U.S.C. 4104; 44 CFR 67.4.

Dated: November 20, 2013.

Roy E. Wright,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2013–29660 Filed 12–11–13; 8:45 am]

BILLING CODE 9110–12–P

Notices

Federal Register

Vol. 78, No. 239

Thursday, December 12, 2013

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Reporting Requirements for Sea Otter Interactions with the Pacific Sardine Fishery; Coastal Pelagic Species Fishery Management Plan.

OMB Control Number: 0648–0566.

Form Number(s): NA.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 2.

Average Hours per Response: 30 minutes.

Burden Hours: 1.

Needs and Uses: This request is for extension of a current information collection.

On May 30, 2007, the National Marine Fisheries Service (NMFS) published a final rule (72 FR 29891) implementing a requirement under the Coastal Pelagic Species (CPS) Fishery Management Plan to report any interactions that may occur between a CPS vessel and/or fishing gear and sea otters.

Specifically, these reporting requirements are:

1. If a southern sea otter is entangled in a net, regardless of whether the animal is injured or killed, such an occurrence must be reported within 24 hours to the Regional Administrator, NMFS Southwest Region.

2. While fishing for CPS, vessel operators must record all observations of otter interactions (defined as otters within encircled nets or coming into contact with nets or vessels, including but not limited to entanglement) with their purse seine net(s) or vessel(s). With the exception of an entanglement, which will be initially reported as described above, all other observations must be reported within 20 days to the Regional Administrator.

When contacting NMFS after an interaction, fishermen are required to provide information regarding the location, specifically latitude and longitude, of the interaction and a description of the interaction itself. Descriptive information of the interaction should include: Whether or not the otters were seen inside or outside the net; if inside the net, had the net been completely encircled; did contact occur with net or vessel; the number of otters present; duration of interaction; otter's behavior during interaction; and measures taken to avoid interaction.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: OIRA_Submission@omb.eop.gov.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: December 6, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–29626 Filed 12–11–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–837]

Certain Magnesia Carbon Bricks From Mexico: Rescission of Antidumping Duty Administrative Review

AGENCY: Enforcement and Compliance, formerly Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: David Goldberger, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4136.

SUPPLEMENTARY INFORMATION:

Background

On September 2, 2011, the Department of Commerce (the Department) published in the **Federal Register** a notice of ''Opportunity to Request Administrative Review'' of the antidumping duty order on certain magnesia carbon bricks from Mexico for the period of review (POR) of September 1, 2012, through August 31, 2013. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 78 FR 54235 (September 3, 2013).

On September 30, 2011, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b), the Department received a timely request from Resco Products, Inc., the petitioner and a domestic interested party, to conduct an administrative review of the sales of RHI-Refmex S.A. de C.V, Trafinsa S.A. de C.V., Vesuvius Mexico S.A. de C.V., and RHI GLAS GmbH. Resco Products, Inc. was the only party to request this administrative review.

On November 8, 2013, the Department published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on certain magnesia carbon bricks from Mexico with respect to RHI-Refmex S.A. de C.V, Trafinsa S.A. de C.V., Vesuvius Mexico S.A. de C.V., and RHI GLAS GmbH. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 78 FR 67104 (November 8, 2013).

On November 18, 2013, Resco Products, Inc. timely withdrew its request for a review of RHI-Refmex S.A. de C.V, Trafinsa S.A. de C.V., Vesuvius Mexico S.A. de C.V., and RHI GLAS GmbH.

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of notice of initiation of the requested review. Resco Products, Inc. withdrew its request for review before the 90-day deadline, and no other party requested an administrative review of the antidumping duty order on certain magnesia carbon bricks from Mexico for the POR. Therefore, in response to Resco Products, Inc.'s withdrawal of its request for review, and pursuant to 19 CFR 351.213(d)(1), the Department is rescinding in whole the administrative review of the antidumping duty order on certain magnesia carbon bricks for the period September 1, 2012, through August 31, 2013.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of this notice in the **Federal Register.**

Notification to Importers

This notice serves as the only reminder to importers of their responsibility, under 19 CFR 351.402(f)(2), to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is published in accordance with section 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: December 6, 2013.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2013–29689 Filed 12–11–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–843]

Prestressed Concrete Steel Rail Tie Wire From Mexico: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination

AGENCY: Enforcement and Compliance, formerly Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''Department'') preliminarily determines that prestressed concrete steel rail tie wire (''PC tie wire'') from Mexico is being, or is likely to be, sold in the United States at less than fair value (''LTFV''), as provided in section 733(b) of the Tariff Act of 1930, as amended (''the Act''). The period of investigation (''POI'') is April 1, 2012, through March 31, 2013. The estimated weighted-average dumping margins of sales at LTFV are shown in the ''Preliminary Determination'' section of this notice. The final determination will be issued 135 days after publication of this preliminary determination in the **Federal Register**.

DATES: *Effective Date:* December 12, 2013.

FOR FURTHER INFORMATION CONTACT: Brandon Custard or Rebecca Trainor, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1823 or (202) 482–4007, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Investigation

The product covered by this investigation is high carbon steel wire; stress relieved or low relaxation; indented or otherwise deformed; meeting at a minimum the physical, mechanical, and chemical requirements of the American Society of Testing Materials (''ASTM'') A881/A881M specification; regardless of shape, size or alloy element levels; suitable for use as prestressed tendons in concrete railroad ties (''PC tie wire''). High carbon steel is defined as steel that contains 0.6 percent or more of carbon by weight.

PC tie wire is classified under the Harmonized Tariff Schedule of the United States (''HTSUS'') subheading 7217.10.8045, but may also be classified under subheadings 7217.10.7000, 7217.10.8025, 7217.10.8030, 7217.10.8090, 7217.10.9000, 7229.90.1000, 7229.90.5016, 7229.90.5031, 7229.90.5051, 7229.90.9000, and 7312.10.3012. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.[1]

Methodology

The Department has conducted this investigation in accordance with section 731 of the Act. Constructed export prices (''CEPs'') have been calculated in accordance with section 772 of the Act. Normal value (''NV'') has been calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying our conclusions, *see* the ''Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Prestressed Concrete Steel Rail Tie Wire from Mexico,'' (''Preliminary Decision Memorandum'') from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, dated concurrently with this determination and hereby adopted by this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *https://iaaccess.trade.gov,* and is available to all parties in the Department's Central Records Unit, located at room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be found at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the

[1] Since the initiation of this investigation, based on interested party comments, we modified the scope to add language to and clarify the meaning of the phrase ''meeting at a minimum the American Society for Testing Materials (''ASTM'') A881/A881M specification,'' and to include two additional HTSUS numbers. For further discussion, see the memorandum entitled ''Scope Modification Requests,'' dated concurrently with this determination.

Preliminary Decision Memorandum are identical in content.

Preliminary Determination [2]

The Department preliminarily determines that the following weighted-average dumping margins exist:

Exporter/manufacturer	Weighted-average dumping margin (percent)
Aceros Camesa S.A. de C.V.	27.88
All Others	27.88

The ''All Others'' rate is based on the weighted-average dumping margin calculated for Aceros Camesa S.A. de C.V., the only company for which the Department calculated a rate.[3]

Disclosure and Public Comment

We will disclose the calculations performed to parties in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the final verification report is issued in this proceeding and rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than five days after the deadline date for case briefs.[4] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce. All documents must be filed electronically using IA ACCESS. An electronically filed request must be received successfully in its entirety by IA ACCESS by 5:00 p.m. Eastern Standard Time, within 30 days after the date of publication of this notice.[5] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, the Department intends to hold the hearing at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Pursuant to a request from the respondent in this investigation, we are postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, we will make our final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.[6]

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing U.S. Customs and Border Protection (''CBP'') to suspend liquidation of all entries of PC tie wire from Mexico, as described in the scope of the investigation section of this notice, which are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

We will instruct CBP to require a cash deposit [7] equal to the weighted-average amount by which the NV exceeds CEP, as indicated in the chart above. These suspension of liquidation instructions will remain in effect until further notice.

International Trade Commission (''ITC'') Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary affirmative determination of sales at LTFV. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: December 5, 2013.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

List of Topics Discussed in the Preliminary Decision Memorandum

1. Differential Pricing Analysis
2. Results of the Differential Pricing Analysis
3. Fair Value Comparisons
4. Product Comparisons
5. Constructed Export Price
6. Normal Value
   a. Home Market Viability
   b. Level of Trade
   c. Calculation of Normal Value Based on Constructed Value
7. Currency Conversion
8. Verification

[FR Doc. 2013–29693 Filed 12–11–13; 8:45 am]

BILLING CODE 3510–DS–P

[2] As explained in the memorandum from the Assistant Secretary for Enforcement and Compliance, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 1, through October 16, 2013. *See* Memorandum for the Record from Paul Piquado, Assistant Secretary for Enforcement and Compliance, ''Deadlines Affected by the Shutdown of the Federal Government'' (October 18, 2013). Therefore, all deadlines in this segment of the proceeding have been extended by 16 days. If the new deadline falls on a non-business day, in accordance with the Department's practice, the deadline will become the next business day. The revised deadline for the preliminary determination in this investigation is now December 5, 2013.

[3] *See* section 735(c)(5)(A) of the Act.

[4] *See* 19 CFR 351.309.

[5] *See* 19 CFR 351.310(c).

[6] *See also* 19 CFR 351.210(e).

[7] *See Modification of Regulations Regarding the Practice of Accepting Bonds During the Provisional Measures Period in Antidumping and Countervailing Duty Investigations,* 76 FR 61042 (October 3, 2011).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–990]

Prestressed Concrete Steel Rail Tie Wire From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination

AGENCY: Enforcement and Compliance, formerly Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''Department'') preliminarily determines that prestressed concrete steel rail tie wire (''PC tie wire'') from the People's Republic of China (''PRC'') is being, or is likely to be, sold in the United States at less than fair value (''LTFV''), as provided in section 733(b) of the Tariff Act of 1930, as amended (''the Act''). The period of investigation (''POI'') is October 1, 2012, through March 31, 2013. The weighted-average dumping margins are shown in the ''Preliminary Determination'' section of this notice. The final determination will be issued 135 days after the publication date of this preliminary determination in the **Federal Register**.

DATES: *Effective Date:* December 12, 2013.

FOR FURTHER INFORMATION CONTACT: Brian Smith or Stephanie Arthur, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1766 and (202) 482–2181, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Investigation

The product covered by this investigation is high carbon steel wire; stress relieved or low relaxation; indented or otherwise deformed; meeting at a minimum the physical, mechanical, and chemical requirements of the American Society of Testing Materials (''ASTM'') A881/A881M specification; regardless of shape, size or alloy element levels; suitable for use as prestressed tendons in concrete railroad ties (''PC tie wire''). High carbon steel is defined as steel that contains 0.6 percent or more of carbon by weight.

PC tie wire is classified under the Harmonized Tariff Schedule of the United States (''HTSUS'') subheading 7217.10.8045, but may also be classified under subheadings 7217.10.7000, 7217.10.8025, 7217.10.8030, 7217.10.8090, 7217.10.9000, 7229.90.1000, 7229.90.5016, 7229.90.5031, 7229.90.5051, 7229.90.9000, and 7312.10.3012. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.[1]

Methodology

The Department has conducted this antidumping duty investigation in accordance with section 731 of the Act. Export prices (''EPs'') have been calculated in accordance with section 772 of the Act. Because the PRC is a non-market economy within the meaning of section 771(18) of the Act, normal value has been calculated in accordance with section 773(c) of the Act. Specifically, unless specified otherwise, the factors of production (''FOPs'') for the respondent, Silvery Dragon Group Technology and Trading Co., Ltd. Tianjin (''Silvery Dragon Tech'') have been valued using data from the primary surrogate country, Thailand, a country comparable economically to the PRC and a significant producer of comparable merchandise.

For a full description of the methodology underlying our conclusions, *see* ''Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Prestressed Concrete Steel Rail Tie Wire from the People's Republic of China,'' from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, dated concurrently with this notice (''Preliminary Decision Memorandum'') and hereby adopted by this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *http://iaaccess.trade.gov,* and is available to all parties in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Combination Rates

In the *Initiation Notice,* the Department stated that it would calculate combination rates for the respondents that are eligible for a separate rate in this investigation.[2] This practice is described in Policy Bulletin 05.1.[3]

Preliminary Determination [4]

The Department preliminarily determines that the following weighted-average dumping margins exist:

Exporter	Producer	Weighted-average dumping margin (percent)
Silvery Dragon Group Technology and Trading Co., Ltd. Tianjin	Silvery Dragon Prestressed Materials Co., Ltd. Tianjin	14.64
PRC-wide Entity*		18.02

*The PRC-wide entity includes Wuxi Jinyang Metal Products Co., Ltd. and Shanxi New-Mile International Trade Co., Ltd.

Disclosure and Public Comment

The Department intends to disclose calculations performed for this preliminary determination to the parties within five days after the date of publication of this notice in accordance with 19 CFR 351.224(b). Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance via IA ACCESS no later than seven days after the date on which the verification report is issued in this proceeding, and rebuttal briefs, limited to issues raised in case briefs, must be submitted via IA ACCESS no later than five days after the deadline for filing case briefs.[5] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1)A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a

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[1] Since the initiation of this investigation, based on interested party comments, we modified the scope to add language to, and clarify the meaning of, the phrase ''meeting at a minimum the American Society for Testing Materials (''ASTM'') A881/A881M specification,'' and to include two additional HTSUS numbers. For further discussion, see the memorandum entitled ''Scope Modification Requests,'' dated concurrently with this determination.

[2] *See Prestressed Concrete Steel Rail Tie Wire From Mexico, The People's Republic of China, and Thailand: Initiation of Antidumping Duty Investigations,* 78 FR 29325, 29330 (May 20, 2013) (''*Initiation Notice''*).

[3] *See* Policy Bulletin No. 05.1, regarding ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries'' (April 5, 2005) (''Policy Bulletin 05.1''), available at *http://enforcement.trade.gov/policy/bull05-1.pdf.*

[4] As explained in the memorandum from the Assistant Secretary for Enforcement and Compliance, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 1, through October 16, 2013. *See* Memorandum for the Record from Paul Piquado, Assistant Secretary for Enforcement and Compliance, ''Deadlines Affected by the Shutdown of the Federal Government'' (October 18, 2013). Therefore, all deadlines in this segment of the proceeding have been extended by 16 days. If the new deadline falls on a non-business day, in accordance with the Department's practice, the deadline will become the next business day. The revised deadline for the preliminary determination in this investigation is now December 5, 2013.

[5] *See* 19 CFR 351.309.

hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Enforcement and Compliance. An electronically filed request must be received successfully in its entirety by IA ACCESS by 5:00 p.m. Eastern Standard Time, within 30 days after the date of publication of this notice.[6] Hearing requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants in the hearing; and (3) a list of the issues to be discussed at the hearing. If a request for a hearing is made, the Department intends to hold the hearing at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and date to be determined.[7] Parties should confirm by telephone the date, time, and location of the hearing, two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Pursuant to a request from the respondent in this investigation, we are postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, we will issue our final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.[8]

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing U.S. Customs and Border Protection (''CBP'') to suspend liquidation of all entries of PC tie wire from the PRC, as described in the scope of the investigation section of this notice, which are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

We will instruct CBP to require a cash deposit[9] equal to the weighted-average amount by which the NV exceeds EP, as indicated in the chart above. These suspension of liquidation instructions will remain in effect until further notice.

International Trade Commission (''ITC'') Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary affirmative determination of sales at LTFV. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: December 5, 2013.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

List of Topics Discussed in the Preliminary Decision Memorandum

1. Respondent Selection
2. Discussion of the Methodology
   a. Non-Market Economy Country
   b. Surrogate Country
   c. Separate Rates
   d. Application of Facts Available and Adverse Inferences
   e. Date of Sale
   f. Fair Value Comparisons
   g. Factor Valuation Methodology
   h. Currency Conversion
3. Verification

[FR Doc. 2013–29690 Filed 12–11–13; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–829]

Prestressed Concrete Steel Rail Tie Wire From Thailand: Preliminary Determination of Sales at Not Less Than Fair Value and Postponement of Final Determination

AGENCY: Enforcement and Compliance, formerly Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''Department'') preliminarily determines that prestressed concrete steel rail tire wire (''PC tie wire'') from Thailand is not being, or likely to be, sold in the United States at less than fair value (''LTFV''), as provided in section 733(b) of the Tariff Act of 1930, as amended (''the Act''). The period of investigation (''POI'') is April 1, 2012, through March 31, 2013. The estimated weighted-average dumping margins of sales at LTFV are shown in the ''Preliminary Determination'' section of this notice. The final determination will be issued 135 days after publication of this preliminary determination in the **Federal Register**.

DATES: *Effective Date:* December 12, 2013.

FOR FURTHER INFORMATION CONTACT: Katherine Johnson or Terre Keaton Stefanova, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4929 or (202) 482–1280, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Investigation

The product covered by this investigation is high carbon steel wire; stress relieved or low relaxation; indented or otherwise deformed; meeting at a minimum the physical, mechanical, and chemical requirements of the American Society of Testing Materials (''ASTM'') A881/A881M specification; regardless of shape, size or alloy element levels; suitable for use as prestressed tendons in concrete railroad ties (''PC tie wire''). High carbon steel is defined as steel that contains 0.6 percent or more of carbon by weight.

PC tie wire is classified under the Harmonized Tariff Schedule of the United States (''HTSUS'') subheading 7217.10.8045, but may also be classified under subheadings 7217.10.7000, 7217.10.8025, 7217.10.8030, 7217.10.8090, 7217.10.9000, 7229.90.1000, 7229.90.5016, 7229.90.5031, 7229.90.5051, 7229.90.9000, and 7312.10.3012. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.[1]

Methodology

The Department has conducted this investigation in accordance with section 731 of the Act. Constructed export prices (''CEPs'') have been calculated in accordance with section 772 of the Act. Normal value (''NV'') has been calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying our conclusions, *see* the ''Decision Memorandum for the Preliminary

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[6] *See also* 19 CFR 351.310(c).

[7] *See id.*

[8] *See also* 19 CFR 351.210(b)(2) and (e).

[9] *See Modification of Regulations Regarding the Practice of Accepting Bonds During the Provisional Measures Period in Antidumping and Countervailing Duty Investigations*, 76 FR 61042 (October 3, 2011).

[1] Since the initiation of this investigation, based on interested party comments, we modified the scope to add language to and clarify the meaning of the phrase ''meeting at a minimum the American Society for Testing Materials (''ASTM'') A881/A881M specification;'' and to include two additional HTSUS numbers. For further discussion, see the memorandum entitled ''Scope Modification Requests,'' dated concurrently with this determination.

Determination in the Antidumping Duty Investigation of Prestressed Concrete Steel Rail Tie Wire from Thailand, from Christian Marsh, Deputy Assistant Secretary for Enforcement and Compliance, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, dated concurrently with this determination and hereby adopted by this notice (''Preliminary Decision Memorandum''). The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *https://iaaccess.trade.gov,* and is available to all parties in the Department's Central Records Unit, located at room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be found at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.[2]

Preliminary Determination

The Department preliminarily determines that the following weighted-average dumping margins exist:

Exporter/manufacturer	Weighted-average dumping margin
The Siam Industrial Wire Co., Ltd.	0.07% (*de minimis*).
All Others	0.07% (*de minimis*).

The ''All Others'' rate is based on the weighted-average dumping margin calculated for The Siam Industrial Wire Co., Ltd., the only company for which the Department calculated a rate.[3]

Suspension of Liquidation

Because the estimated weighted-average dumping margin for the examined company is *de minimis,* we are not directing U.S. Customs and Border Protection to suspend liquidation of entries of PC tie wire from Thailand.

Disclosure and Public Comment

We will disclose the calculations performed to parties in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the final verification report is issued in this proceeding and rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than five days after the deadline date for case briefs.[4] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce. All documents must be filed electronically using IA ACCESS. An electronically filed request must be received successfully in its entirety by IA ACCESS, by 5:00 p.m. Eastern Standard Time, within 30 days after the date of publication of this notice.[5] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, the Department intends to hold the hearing at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination

Pursuant to a request from the petitioners in this investigation, we are postponing the final determination. Accordingly, we will make our final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.[6]

International Trade Commission (''ITC'') Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary negative determination of sales at LTFV. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: December 5, 2013.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

List of Topics Discussed in the Preliminary Decision Memorandum

1. Differential Pricing Analysis
2. Results of the Differential Pricing Analysis
3. Fair Value Comparisons
4. Product Comparisons
5. Date of Sale
6. Constructed Export Price
7. Normal Value
   a. Comparison Market Viability
   b. Level of Trade
   c. Calculation of Normal Value Based on Constructed Value
8. Currency Conversion
9. Verification

[FR Doc. 2013–29692 Filed 12–11–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Estuarine Research Reserve System

AGENCY: Estuarine Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce

ACTION: Notice of Approval of the Wells, Maine National Estuarine Research Reserve Management Plan revision.

SUMMARY: Notice is hereby given that the Estuarine Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce approves the Wells, Maine National Estuarine Research Reserve Management Plan revision. The revised management plan outlines the administrative structure; the research,

[2] As explained in the memorandum from the Assistant Secretary for Enforcement and Compliance, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 1, through October 16, 2013. *See* Memorandum for the Record from Paul Piquado, Assistant Secretary for Enforcement and Compliance, ''Deadlines Affected by the Shutdown of the Federal Government'' (October 18, 2013). Therefore, all deadlines in this segment of the proceeding have been extended by 16 days. If the new deadline falls on a non-business day, in accordance with the Department's practice, the deadline will become the next business day. The revised deadline for the preliminary determination in this investigation is now December 5, 2013.

[3] *See* section 735(c)(5)(A) of the Act.

[4] *See* 19 CFR 351.309.

[5] *See* 19 CFR 351.310(c).

[6] *See also* 19 CFR 351.210(e).

education, training, and stewardship goals of the reserve; and the plans for future land acquisition and facility development to support reserve operations. The Wells Reserve Management Plan revision will replace the plan approved in 2007.

The Wells, Maine National Estuarine Research Reserve takes an integrated approach to management, linking research, education, training and stewardship functions to address high priority issues including the impact of climate change of coastal ecosystems and communities, development pressures, population growth, land-use change, habitat fragmentation, and water quality degradation. Since the last management plan, the reserve implemented its core programs and expanded its monitoring infrastructure to include capabilities for understanding climate impacts; enhanced its facilities, including new Visitor Center exhibits and interpretive trail signs; constructed an environmental chamber for year-round research; and furthered land conservation in the reserve's targeted watersheds.

The revised management plan will serve as the guiding document for the 2,250 acre Wells National Estuarine Research Reserve for the next five years. The Wells National Estuarine Research Reserve Management Plan revision can be viewed at *www.wellsreserve.org*. Comments can be provided to Paul Dest, Reserve Director at *dest@wellsnerr.org*.

FOR FURTHER INFORMATION CONTACT: Alison Krepp at (301) 563–7105 or Erica Seiden at (301) 563–1172 of NOAA's National Ocean Service, Estuarine Reserves Division, 1305 East-West Highway, N/ORM5, 10th Floor, Silver Spring, MD 20910.

Dated: December 6, 2013.

Christopher C. Cartwright,

Associate Assistant Administrator for Management and CFO/CAO, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2013–29673 Filed 12–11–13; 8:45 am]

BILLING CODE 3510–08–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (CNCS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of the collection requirement on respondents can be properly assessed.

Currently, CNCS is soliciting comments on its proposed revised enrollment and exit forms entitled National Service Trust Enrollment Form and National Service Trust Exit Form. The Enrollment Form and Exit Forms are used by AmeriCorps members and program staff to enroll in the National Service Trust and to document the completion of AmeriCorps member's term of service. AmeriCorps requires these forms in order for members to receive a Segal Education Award.

Copies of the forms can be obtained by contacting the office listed in the **ADDRESSES** section of this Notice.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by February 10, 2014.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service, Attention Bruce Kellogg, 8309C, 1201 New York Avenue NW., Washington, DC 20525.

(2) By hand delivery or by courier to the CNCS mailroom at Room 8100 at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except Federal holidays.

(3) Electronically through *www.regulations.gov*.

Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 1–800–833–3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Bruce Kellogg, (202) 606–6954, or by email at *bkellogg@cns.gov*.

SUPPLEMENTARY INFORMATION:

CNCS is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submissions of responses).

Background

The Enrollment Form and Exit Forms are used by AmeriCorps members and program staff to enroll in the National Service Trust and to document the completion of a member's term of service, a requirement to receiving a Segal Education Award and to meet other legal and program requirements. This information is also entered electronically into the National Service Trust's database.

Current Action

CNCS seeks to renew the current information collection with some changes, principally to demographics questions, such as income levels, disability, veteran's status, citizenship status, and educational levels.

The information collection will otherwise be used in the same manner as the existing forms. CNCS also seeks to continue using the current forms until the revised forms are approved by OMB. The current application is due to expire on 05/31/2016.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: National Service Trust Enrollment and Exit Forms.

OMB Number: 3045–0006.

Agency Number: None.

Affected Public: AmeriCorps members, grantee and other program staff.

Total Respondents: 160,000.

Frequency: Once per form.

Average Time per Response: Averages 10 minutes per form.

Estimated Total Burden Hours: 266,667.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in CNCS's request for Office of Management and Budget approval of the information collection forms; they will also become a matter of public record.

Dated: December 5, 2013.

Maggie Taylor-Coates,

Chief of Trust Operations.

[FR Doc. 2013–29663 Filed 12–11–13; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF EDUCATION

Tests Determined To Be Suitable for Use in the National Reporting System for Adult Education

AGENCY: Office of Vocational and Adult Education, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary annually announces tests, test forms, and delivery formats that the Secretary determines to be suitable for use in the National Reporting System for Adult Education (NRS).

FOR FURTHER INFORMATION CONTACT: Michelle Meier, Department of Education, 400 Maryland Avenue SW., Room 11161, Potomac Center Plaza, Washington, DC 20202–7240. Telephone: (202) 245–7890 or by email: *Michelle.Meier@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On January 14, 2008, we published in the **Federal Register** final regulations for 34 CFR part 462, Measuring Educational Gain in the National Reporting System for Adult Education (NRS regulations) (73 FR 2306). The NRS regulations established the process the Secretary uses to determine the suitability of tests for use in the NRS by States and local eligible providers. We annually publish in the **Federal Register** and post on the Internet at *http://www.nrsweb.or*g a list of the names of tests and the educational functioning levels the tests are suitable to measure in the NRS as required by § 462.12(c)(2) of the NRS regulations.

On April 16, 2008, we published in the **Federal Register** a notice inviting test publishers to submit tests for review under the NRS regulations (73 FR 20616).

On February 2, 2010, we published in the **Federal Register** a notice (February 2010 notice) listing the tests and test forms the Secretary determined to be suitable for use in the NRS (75 FR 5303).

The Secretary determined tests and test forms to be suitable for a period of either seven or three years from the date of the February 2010 notice. A seven-year approval required no additional action on the part of the publisher, unless the information the publisher submitted as a basis for the Secretary's review was inaccurate or unless the test is substantially revised. A three-year approval was issued with a set of conditions to be met by the completion of the three-year period. If these conditions were met, the Secretary would approve a period of time for which the test may continue to be used in the NRS.

On September 12, 2011, we published in the **Federal Register** (76 FR 56188) a notice (September 2011 notice) to update the list published in the February 2010 notice, and include suitable test delivery formats. The update clarified that some, but not all, tests using computer-adaptive or computer-based delivery formats are suitable for use in the NRS.

On August 6, 2012, we published in the **Federal Register** (77 FR 46749) the same list of forms and computer delivery formats for the tests published in the September 2011 notice. We also announced a sunset period during which States and local providers may continue to use tests with three-year NRS approvals otherwise expiring on February 2, 2013, during a transition period ending on June 30, 2014.

On January 25, 2013, we announced in the **Federal Register** (78 FR 5430) an extension of the approval period for tests approved for a three-year period beginning on February 2, 2010. The approval period was extended from February 2, 2013 to September 30, 2013, with the sunset period ending on June 30, 2014 still applicable.

The Secretary publishes here the list of tests and test forms determined to be suitable for use in the NRS. These include: (1) Tests previously approved for a seven-year period from February 2, 2010; (2) three tests—previously approved for a three-year conditional period from February 2, 2010—for which the Secretary is extending the approval period through June 30, 2015; and (3) one test—a revised version of a test previously approved for a three-year conditional period from February 2, 2010—for which the Secretary is providing an approval period through June 30, 2015. The extended approval period through June 30, 2015 for these four tests is issued with a set of conditions for each test that a test publisher must meet eby the completion of the extended period. If a test publisher meets these conditions, the Secretary approves a period of time for which the test may continue to be used in the NRS.

Approved Tests, Forms and Approval Periods

Adult education programs must use only the approved forms and computer delivery formats for the tests published in this notice. If a particular test form or computer delivery format is not explicitly specified for a test in this notice, it is not approved for use in the NRS.

Tests Determined To Be Suitable for Use in the NRS for Seven Years

(a) The Secretary has determined that the following test is suitable for use at all Adult Basic Education (ABE) and Adult Secondary Education (ASE) levels and at all English-as-a-Second-Language (ESL) levels of the NRS for a period of seven years beginning on February 2, 2010:

Comprehensive Adult Student Assessment Systems (CASAS) Reading Assessments (Life and Work, Life Skills, Reading for Citizenship, Reading for Language Arts—Secondary Level). Forms 27, 28, 81, 82, 81X, 82X, 83, 84, 85, 86, 185, 186, 187, 188, 310, 311, 513, 514, 951, 952, 951X, and 952X of this test are approved for use on paper and through the computer-based delivery format. Publisher: CASAS, 5151 Murphy Canyon Road, suite 220, San Diego, CA 92123–4339. Telephone: (800) 255–1036. Internet: *www.casas.org.*

(b) The Secretary has determined that the following tests are suitable for use at all ABE and ASE levels of the NRS for a period of seven years beginning on February 2, 2010:

(1) *Comprehensive Adult Student Assessment Systems (CASAS) Life Skills Math Assessments—Application of Mathematics (Secondary Level).* Forms 31, 32, 33, 34, 35, 36, 37, 38, 505, and 506 of this test are approved for use on paper and through the computer-based delivery format. Publisher: CASAS, 5151 Murphy Canyon Road, suite 220, San Diego, CA 92123–4339. Telephone: (800) 255–1036. Internet: *www.casas.org.*

(2) *Massachusetts Adult Proficiency Test (MAPT) for Math.* This test is approved for use through a computer-adaptive delivery format. Publisher: Massachusetts Department of Elementary and Secondary Education and University of Massachusetts Amherst, School of Education, 156 Hills South, University of Massachusetts, Amherst, MA 01003. Telephone: (413) 545–0564. Internet: *www.sabes.org/assessment/mapt.htm.*

(3) *Massachusetts Adult Proficiency Test (MAPT) for Reading.* This test is approved for use through the computer-adaptive delivery format. Publisher: Massachusetts Department of Elementary and Secondary Education and University of Massachusetts Amherst, School of Education, 156 Hills South, University of Massachusetts, Amherst, MA 01003. Telephone: (413) 545–0564. Internet: *www.sabes.org/assessment/mapt.htm.*

(4) *Tests of Adult Basic Education (TABE 9/10).* Forms 9 and 10 are approved for use on paper and through the computer-based delivery format. Publisher: CTB/McGraw Hill, 20 Ryan Ranch Road, Monterey, CA 93940. Telephone: (800) 538–9547. Internet: *www.ctb.com.*

(5) *Tests of Adult Basic Education Survey (TABE Survey).* Forms 9 and 10 are approved for use on paper and through the computer-based delivery format. Publisher: CTB/McGraw Hill, 20 Ryan Ranch Road, Monterey, CA 93940. Telephone: (800) 538–9547. Internet: *www.ctb.com.*

(c) The Secretary has determined that the following tests are suitable for use at all ESL levels of the NRS for a period of seven years beginning on February 2, 2010:

(1) *Basic English Skills Test (BEST) Literacy.* Forms B, C, and D are approved for use on paper. Publisher: Center for Applied Linguistics, 4646 40th Street NW., Washington, DC 20016–1859. Telephone: (202) 362–0700. Internet: *www.cal.org.*

(2) *Tests of Adult Basic Education Complete Language Assessment System—English (TABE/CLAS–E).* Forms A and B are approved for use on paper. Publisher: CTB/McGraw Hill, 20 Ryan Ranch Road, Monterey, CA 93940. Telephone: (800) 538–9547. Internet: *www.ctb.com.*

Tests Determined To Be Suitable for Use in the NRS Until June 30, 2015

(a) The Secretary has determined that the following tests are suitable for use at all ABE and ASE levels of the NRS until June 30, 2015:

(1) *General Assessment of Instructional Needs (GAIN)—Test of English Skills.* Forms A and B are approved for use on paper and through the computer-based delivery format. Publisher: Wonderlic Inc., 400 Lakeview Parkway, Suite 200, Vernon Hills, IL 60061. Telephone: (877) 605–9496. Internet: *www.wonderlic.com.*

(2) *General Assessment of Instructional Needs (GAIN)—Test of Math Skills.* Forms A and B are approved for use on paper and through the computer-based delivery format. Publisher: Wonderlic Inc., 400 Lakeview Parkway, Suite 200, Vernon Hills, IL 60061. Telephone: (877) 605–9496. Internet: *www.wonderlic.com.*

(b) The Secretary has determined that the following tests are suitable for use at all ESL levels of the NRS until June 30, 2015:

(1) *Basic English Skills Test (BEST) Plus.* Forms A, B, and C are approved for use on paper and through the computer-adaptive delivery format. Publisher: Center for Applied Linguistics, 4646 40th Street NW., Washington, DC 20016–1859. Telephone: (202) 362–0700. Internet: *www.cal.org.*

(2) *Comprehensive Adult Student Assessment Systems (CASAS) Life and Work Listening Assessments (LW Listening).* Forms 981L, 982L, 983L, 984L, 985L and 986L are approved for use on paper and through the computer-based delivery format. Publisher: CASAS, 5151 Murphy Canyon Road, Suite 220, San Diego, CA 92123–4339. Telephone: (800) 255–1036. Internet: *www.casas.org.*

Tests That May Be Used in the NRS During the Sunset Period Ending on June 30, 2014

(a) The Secretary has determined that the following tests may be used at the High Intermediate, Low Adult Secondary, and High Adult Secondary levels of the NRS during the sunset period ending on June 30, 2014:

(1) *WorkKeys: Applied Mathematics.* Forms 210 and 220 are approved for use on paper. Publisher: ACT, 500 ACT Drive, P.O. Box 168, Iowa City, Iowa 52243–0168. Telephone: (800) 967–5539. Internet: *www.act.org.*

(2) *WorkKeys: Reading for Information.* Forms 110 and 120 are approved for use on paper. Publisher: ACT, 500 ACT Drive, P.O. Box 168, Iowa City, Iowa 52243–0168. Telephone: (800) 967–5539. Internet: *www.act.org.*

(b) The Secretary has determined that the following tests may be used at all ABE and ASE levels and at all ESL levels of the NRS during the sunset period ending on June 30, 2014:

(1) Comprehensive Adult Student Assessment Systems (CASAS) Employability Competency System (ECS) Reading Assessments—Workforce Learning Systems (WSL). Forms 11, 12, 13, 14, 15, 16, 17, 18, 114, 116, 213, 214, 215, and 216 may be used on paper and through the computer-based delivery format. Publisher: CASAS, 5151 Murphy Canyon Road, Suite 220, San Diego, CA 92123–4339. Telephone: (800) 255–1036. Internet: *www.casas.org.*

(2) Comprehensive Adult Student Assessment Systems (CASAS) Functional Writing Assessments. Forms 460, 461, 462, 463, 464, 465, and 466 are approved for use on paper. Publisher: CASAS, 5151 Murphy Canyon Road, Suite 220, San Diego, CA 92123–4339. Telephone: (800) 255–1036. Internet: *www.casas.org.*

(c) The Secretary has determined that the following test may be used at all ABE and ASE levels of the NRS during the sunset period ending on June 30, 2014:

(1) Comprehensive Adult Student Assessment Systems (CASAS) Employability Competency System (ECS) Math Assessments—Workforce Learning Systems (WLS). Forms 11, 12, 13, 14, 15, 16, 17, 18, 213, 214, 215, and 216 are approved for use on paper and through the computer-based delivery format. Publisher: CASAS, 5151 Murphy Canyon Road, Suite 220, San Diego, CA 92123–4339. Telephone: (800) 255–1036. Internet: *www.casas.org.*

(d) The Secretary has determined that the following test may be used at all ESL levels of the NRS during the sunset period ending on June 30, 2014:

(1) Comprehensive Adult Student Assessment Systems (CASAS) Employability Competency System (ECS) Listening Assessments—Life Skills (LS). Forms 51, 52, 53, 54, 55, 56, 63, 64, 65, and 66 are approved for use on paper and through the computer-based delivery format. Publisher: CASAS, 5151 Murphy Canyon Road, Suite 220, San Diego, CA 92123–4339. Telephone: (800) 255–1036. Internet: *www.casas.org.*

Expiring Tests

The sunset period for an expiring test allows a State and local provider to transition to other tests suitable for use in the NRS. The State and local provider may use the transition period to select new tests, purchase appropriate inventories of assessment materials, and provide training to staff.

Revocation of Tests

Under certain circumstances the Secretary may revoke the determination that a test is suitable (see 34 CFR 462.12(e)). If the Secretary revokes the determination of suitability, the Secretary announces through the **Federal Register** and posts on the Internet at *www.nrsweb.org* a notice of that revocation, along with the date by which States and local eligible providers must stop using the revoked test.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT** in this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Program Authority: 20 U.S.C. 9212.

Dated: December 9, 2013.

Johan Uvin,

Deputy Assistant Secretary for Policy and Strategic Initiatives, Delegated Authority to Perform the Functions and Duties of the Assistant Secretary for Vocational and Adult Education.

[FR Doc. 2013–29709 Filed 12–11–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a combined meeting of the Environmental Monitoring and Remediation Committee and Waste Management Committee of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico (known locally as the Northern New Mexico Citizens' Advisory Board [NNMCAB]). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, January 8, 2014, 2:00 p.m.–4:00 p.m.

ADDRESSES: Cities of Gold Conference Center, NNMCAB Conference Room, 94 Cities of Gold Road, Pojoaque, NM 87506.

FOR FURTHER INFORMATION CONTACT: Menice Santistevan, Northern New Mexico Citizens' Advisory Board, 94 Cities of Gold Road, Santa Fe, NM 87506. Phone (505) 995–0393; Fax (505) 989–1752 or Email: *menice.santistevan@nnsa.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Purpose of the Environmental Monitoring and Remediation Committee (EM&R): The EM&R Committee provides a citizens' perspective to NNMCAB on current and future environmental remediation activities resulting from historical Los Alamos National Laboratory operations and, in particular, issues pertaining to groundwater, surface water and work required under the New Mexico Environment Department Order on Consent. The EM&R Committee will keep abreast of DOE–EM and site programs and plans. The committee will work with the NNMCAB to provide assistance in determining priorities and the best use of limited funds and time. Formal recommendations will be proposed when needed and, after consideration and approval by the full NNMCAB, may be sent to DOE–EM for action.

Purpose of the Waste Management (WM) Committee: The WM Committee reviews policies, practices and procedures, existing and proposed, so as to provide recommendations, advice, suggestions and opinions to the NNMCAB regarding waste management operations at the Los Alamos site.

Tentative Agenda

1. 2:00 p.m. Approval of Agenda
2. 2:05 p.m. Review of Minutes from September 10, 2013 (Approved November 20, 2013)
3. 2:07 p.m. Old Business
   - Update on Waste Isolation Pilot Plant Permit Modification (Hanford Mod)
   - Review of Mercury Supplemental Environmental Impact Statement NNMCAB Comment Responses
4. 2:25 p.m. New Business
   - NNMCAB 101
5. 2:40 p.m. Update from Executive Committee—Carlos Valdez, Chair
6. 2:50 p.m. Update from DOE—Lee Bishop, Deputy Designated Federal Officer
7. 3:00 p.m. Presentation by Tori George, Los Alamos National Security
   - General Information on Los Alamos National Laboratory
8. 3:45p.m. Public Comment Period
9. 4:00 p.m. Adjourn

Public Participation: The NNMCAB's Committees welcome the attendance of the public at their combined committee meeting and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Menice Santistevan at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Committees either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Santistevan at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Menice Santistevan at the address or phone number listed above. Minutes and other Board documents are on the Internet at: *http://www.nnmcab.energy.gov/*.

Issued at Washington, DC, on December 9, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–29680 Filed 12–11–13; 8:45 am]

BILLING CODE 6405–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge Reservation. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, January 8, 2014, 6:00 p.m.

ADDRESSES: Department of Energy Information Center, Office of Science and Technical Information, 1

Science.gov Way, Oak Ridge, Tennessee 37830.

FOR FURTHER INFORMATION CONTACT: Melyssa P. Noe, Federal Coordinator, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831. Phone (865) 241–3315; Fax (865) 576–0956 or email: *noemp@emor.doe.gov* or check the Web site at *www.oakridge.doe.gov/em/ssab.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

- Welcome and Announcements
- Comments from the Deputy Designated Federal Officer
- Comments from the DOE, Tennessee Department of Environment and Conservation, and Environmental Protection Agency Liaisons
- Public Comment Period
- Presentation
- Additions/Approval of Agenda
- Motions/Approval of November 13, 2013 Meeting Minutes
- Status of Recommendations with DOE
- Committee Reports
- Federal Coordinator Report
- Adjourn

Public Participation: The EM SSAB, Oak Ridge, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Melyssa P. Noe at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to the agenda item should contact Melyssa P. Noe at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Melyssa P. Noe at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.oakridge.doe.gov/em/ssab/board-minutes.html.*

Issued at Washington, DC, on December 6, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–29681 Filed 12–11–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4344–011]

Cedar Rapids Water Board; Notice of Application Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Surrender of Exemption.

b. *Project No.:* 4344–011.

c. *Date Filed:* November 5, 2013.

d. *Applicant:* City of Cedar Rapids, Iowa.

e. *Name of Project:* Five-In-One Dam.

f. *Location:* On the Cedar River in Linn County, Iowa.

g. *Filed Pursuant to:* 18 CFR 4.95.

h. *Applicant Contact:* Bruce A. Jacobs, Utilities Engineering Manager, City of Cedar Rapids, Iowa, 1111 Shaver Road NE., Cedar Rapids, IA 52402–4593.

i. *FERC Contact:* Ms. Krista Sakallaris, (202) 502–6302, *krista.sakallaris@ferc.gov*.

j. Deadline for filing comments, motions to intervene, and protests, is 30 days from the issuance date of this notice. All documents may be filed electronically via the Internet. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments.

Please include the project number (P–4344–011) on any comments, motions, or protests filed.

k. *Description of Request:* The City of Cedar Rapids, Iowa (exemptee) proposes to surrender the exemption for the Five-In-One Dam Project (P–4344). The exemptee states that the project has not operated since the facility was flooded in June of 2008 and that it is not economical to rehabilitate the project and resume operation. The exemptee disconnected the electric generating equipment from the local power grid in 2008. The exemptee completed the cleanup of water, oil, and sludge from the interior of the hydropower facility in November 2012. Currently, the facility is secured and the exemptee plans on leaving the structure and inoperable equipment in place.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the license surrender. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: December 5, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–29602 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP14–241–000.
Applicants: Columbia Gas Transmission, LLC.
Description: TCO Modernization—2014 Base Rate Reduction to be effective 1/1/2014.
Filed Date: 12/2/13.
Accession Number: 20131202–5038.
Comments Due: 5 p.m. ET 12/16/13.

Docket Numbers: RP14–242–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Neg Rate Agmt Filing (Entergy LA 40489) to be effective 12/1/2013.
Filed Date: 12/2/13.
Accession Number: 20131202–5048.
Comments Due: 5 p.m. ET 12/16/13.

Docket Numbers: RP14–243–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Cap Rel Neg Rate Agmt Filing (Petrohawk 41455 to Texla 41554) to be effective 12/1/2013.
Filed Date: 12/2/13.
Accession Number: 20131202–5050.
Comments Due: 5 p.m. ET 12/16/13.

Docket Numbers: RP14–244–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Cap Rel Neg Rate Agmt Filing (Encana 37663 to Texla 41556) to be effective 12/1/2013.
Filed Date: 12/2/13.
Accession Number: 20131202–5051.
Comments Due: 5 p.m. ET 12/16/13.

Docket Numbers: RP14–245–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Cap Rel Neg Rate Agmt Filing (JW Operating 34690 to Q-West 41559) to be effective 12/1/2013.
Filed Date: 12/2/13.
Accession Number: 20131202–5052.
Comments Due: 5 p.m. ET 12/16/13.

Docket Numbers: RP14–246–000.
Applicants: Gulf Crossing Pipeline Company LLC.
Description: Amendment to Neg Rate Agmt (BP 37–13) to be effective 12/3/2013.
Filed Date: 12/2/13.
Accession Number: 20131202–5055.
Comments Due: 5 p.m. ET 12/16/13.

Docket Numbers: RP14–247–000.
Applicants: Sea Robin Pipeline Company, LLC.
Description: Sea Robin Pipeline Company, LLC submits tariff filing per 154.312: Sea Robin Docket No. RP14–xxx Rate Case to be effective 1/1/2014.
Filed Date: 12/2/13.
Accession Number: 20131202–5124.
Comments Due: 5 p.m. ET 12/16/13.

Docket Numbers: RP14–248–000.
Applicants: Transcontinental Gas Pipe Line Company.
Description: Transcontinental Gas Pipe Line Company, LLC submits tariff filing per 154.204: Negotiated Rates—Cherokee AGL—Replacement Shippers—Dec 2013 to be effective 12/1/2013.
Filed Date: 12/2/13.
Accession Number: 20131202–5150.
Comments Due: 5 p.m. ET 12/16/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 3, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–29565 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP14–226–000.
Applicants: Northern Natural Gas Company.
Description: 20131127 Negotiated Rate Non-Conforming to be effective 1/1/2014.
Filed Date: 11/27/13.
Accession Number: 20131127–5063.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–227–000.
Applicants: KPC Pipeline, LLC.
Description: Request for Waiver of Tariff Provision Requiring the Filing of an Annual Interruptible Transportation Revenue Crediting Report of KPC Pipeline, LLC.
Filed Date: 11/27/13.
Accession Number: 20131127–5072.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–228–000.
Applicants: Elba Express Company, L.L.C.
Description: Clean-up Filing to be effective 1/1/2014.
Filed Date: 11/27/13.
Accession Number: 20131127–5076.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–229–000.
Applicants: MarkWest Pioneer, L.L.C.
Description: Quarterly Fuel Adjustment Filing of MarkWest Pioneer, L.L.C.
Filed Date: 11/27/13.
Accession Number: 20131127–5080.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–230–000.
Applicants: Iroquois Gas Transmission System, L.P.

Description: 11/27/13 Negotiated Rates—JP Morgan Ventures (RTS) 6025–26 to be effective 12/1/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5090.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–231–000.
Applicants: Northern Natural Gas Company.
Description: 20131127 Negotiated Rate to be effective 12/1/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5111.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–232–000.
Applicants: Young Gas Storage Company, Ltd.
Description: Young Fuel Reimbursement Filing to be effective 1/1/2014.
Filed Date: 11/27/13.
Accession Number: 20131127–5115.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–233–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: Non-Conforming Transportation Service Agreements Filing to be effective 1/1/2014.
Filed Date: 11/27/13.
Accession Number: 20131127–5159.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–234–000.
Applicants: Texas Eastern Transmission, LP.
Description: ConocoPhillips 12–01–2013 Releases to be effective 12/1/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5195.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–235–000.
Applicants: Tallgrass Interstate Gas Transmission, L.
Description: Neg Rate 2013–12–2 Green Plains Wood River fka/Pioneer Trail A&R NC NRA to be effective 12/1/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5196.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–236–000.
Applicants: Natural Gas Pipeline Company of America.
Description: Negotiated Rate Filing—Tenaska LPS—RO 143863 to be effective 12/1/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5215.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–237–000.
Applicants: Alliance Pipeline L.P.
Description: Dec 1 2013 Permanent Assignments to be effective 12/1/2013.
Filed Date: 11/27/13.
Accession Number: 20131127–5223.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–238–000.
Applicants: ETC Tiger Pipeline, LLC.
Description: Tiger Cost and Revenue Study CP09–460.
Filed Date: 11/27/13.
Accession Number: 20131127–5225.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–239–000.
Applicants: Fayetteville Express Pipeline LLC.
Description: FEP Cost and Revenue Study CP09–433.
Filed Date: 11/27/13.
Accession Number: 20131127–5231.
Comments Due: 5 p.m. ET 12/9/13.

Docket Numbers: RP14–240–000.
Applicants: Alliance Pipeline L.P.
Description: 2014 Negotiated Rate Filing to be effective 1/1/2014.
Filed Date: 11/29/13.
Accession Number: 20131129–5030.
Comments Due: 5 p.m. ET 12/11/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 2, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–29564 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–3697–000.
Applicants: Southern California Edison Company.
Description: Informational Filing of Formula Transmission Rate 2014 Annual Update of Southern California Edison Company.
Filed Date: 11/26/13.
Accession Number: 20131126–5195.
Comments Due: 5 p.m. ET 12/16/13.

Docket Numbers: ER13–298–002.
Applicants: New York Independent System Operator, Inc.
Description: NYISO compliance filing tariff revision on Market Mitigation to be effective 9/25/2013.
Filed Date: 12/3/13.
Accession Number: 20131203–5137.
Comments Due: 5 p.m. ET 12/24/13.

Docket Numbers: ER13–1346–000.
Applicants: Mesa Wind Power Corporation.
Description: Mesa Wind Power Corporation submits Mesa Wind Refund Report 12.4.2013 to be effective N/A.
Filed Date: 12/4/13.
Accession Number: 20131204–5049.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–206–002.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 2013–12–03 Appendix A SOC Revs to be effective 12/28/2013.
Filed Date: 12/3/13.
Accession Number: 20131203–5084.
Comments Due: 5 p.m. ET 12/24/13.

Docket Numbers: ER14–209–001.
Applicants: PowerOne Corporation.
Description: Amendment to MBR Application to be effective 11/28/2013.
Filed Date: 12/3/13.
Accession Number: 20131203–5162.
Comments Due: 5 p.m. ET 12/24/13.

Docket Numbers: ER14–382–001.
Applicants: Cheyenne Light, Fuel and Power Company.
Description: Cheyenne Light, Fuel and Power Company submits Order No. 764 Compliance Filing Amendment to be effective 12/4/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5069.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–517–000.
Applicants: Arizona Public Service Company.
Description: Amendment to APS RS No. 259, WAPA Bouse Switchyard Construction Agreement to be effective 12/31/2013.
Filed Date: 12/3/13.
Accession Number: 20131203–5099.
Comments Due: 5 p.m. ET 12/24/13.

Docket Numbers: ER14–518–000.
Applicants: Powerex Corp.
Description: Amendment to Powerex FERC Rate Schedule No. 1 to be effective 12/3/2013.
Filed Date: 12/3/13.
Accession Number: 20131203–5100.
Comments Due: 5 p.m. ET 12/24/13.

Docket Numbers: ER14–519–000.
Applicants: Astral Energy LLC.
Description: Astral Energy Market Based Rate Tariff to be effective 1/15/2014.

Filed Date: 12/3/13.
Accession Number: 20131203–5134.
Comments Due: 5 p.m. ET 12/24/13.

Docket Numbers: ER14–520–000.
Applicants: Ivanpah Master Holdings, LLC.
Description: Ivanpah Master Holdings, LLC submits Cancellation of MBR Tariff to be effective 12/5/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5029.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–521–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits Service Agreement Mass Cancellation Filing—Group #1 to be effective 12/1/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5035.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–522–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits Service Agreement Mass Cancellation Filing—Group #2 to be effective 12/1/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5037.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–523–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits Service Agreement Mass Cancellation Filing—Group #3 to be effective 12/1/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5041.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–524–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits Service Agreement Mass Cancellation Filing—Group #4 to be effective 12/1/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5042.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–525–000.
Applicants: ISO New England Inc., New England Power Pool Participants Committee.
Description: ISO New England Inc. submits Rev. Related to FA for Non-Commercial Capacity in the FCM to be effective 3/28/2014.
Filed Date: 12/4/13.
Accession Number: 20131204–5045.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–526–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits Service Agreement Mass Cancellation Filing—Group #5 to be effective 12/1/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5047.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–527–000.
Applicants: Green Current Solutions, LLC.
Description: Green Current Solutions, LLC submits Green Current Solutions Market Based Rate Tariff to be effective 1/20/2014.
Filed Date: 12/4/13.
Accession Number: 20131204–5048.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–528–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits Service Agreement Mass Cancellation Filing—Group #6 to be effective 12/1/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5050.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–529–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits Service Agreement Mass Cancellation Filing—Group #7 to be effective 12/1/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5053.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–530–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits Service Agreement Mass Cancellation Filing—Group #8 to be effective 12/1/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5054.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–531–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits Service Agreement Mass Cancellation Filing—Group #9 to be effective 12/1/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5057.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–532–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits Service Agreement Mass Cancellation Filing—Group #10 to be effective 12/1/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5060.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–533–000.
Applicants: Arizona Public Service Company.
Description: Arizona Public Service Company submits Schedule No. 217—Raceway—Exhibit B.RWY, Revision No. 6 to be effective 2/3/2014.
Filed Date: 12/4/13.
Accession Number: 20131204–5061.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–534–000.
Applicants: Arizona Public Service Company.
Description: Arizona Public Service Company submits Rate Schedule No. 217—Gila-Gila Valley—Exhibit B.GLA.GLV, Revision No. 2 to be effective 2/3/2014.
Filed Date: 12/4/13.
Accession Number: 20131204–5062.
Comments Due: 5 p.m. ET 12/26/13.

Docket Numbers: ER14–535–000.
Applicants: Alcoa Power Generating Inc.
Description: Alcoa Power Generating Inc. submits OATT Order Nos. 764 and 784 Compliance Filing to be effective 12/5/2013.
Filed Date: 12/4/13.
Accession Number: 20131204–5095.
Comments Due: 5 p.m. ET 12/26/13.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RR13–9–002.
Applicants: North American Electric Reliability Corporation.
Description: North American Electric Reliability Corporation's Filing of Corrected Appendix 2 to its 2014 Business Plan and Budget under RR13–9.
Filed Date: 12/3/13.
Accession Number: 20131203–5185.
Comments Due: 5 p.m. ET 12/24/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 4, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–29570 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF13–11–000]

CE FLNG, LLC, CE Pipeline, LLC; Notice of Intent To Prepare an Environmental Impact Statement for the Planned CE FLNG Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meeting

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental impact statement (EIS) that will discuss the environmental impacts of the CE FLNG Project involving construction and operation of liquefied natural gas (LNG) export, and interstate natural gas transmission pipeline facilities by CE FLNG, LLC and CE Pipeline, LLC (collectively referred to as CE FLNG) in Plaquemines Parish, Louisiana. The Commission will use this EIS in its decision-making process to determine whether to authorize the LNG facilities. The Commission will also use this EIS to help determine whether the pipeline facilities are in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies about the project. Your input will help the Commission's staff determine what issues need to be evaluated in the EIS. Please note that the scoping period will close on January 6, 2014.

Comments about the project may be submitted in writing or verbally. The Public Participation section of this notice describes how to submit written comments. Verbal comments can be provided at the public scoping meeting scheduled as follows: FERC Public Scoping Meeting, CE FLNG Project, Wednesday—December 18, 2013—6:00 p.m., Buras Auditorium, 35619 Highway 11, Buras, Louisiana 70041.

CE FLNG representatives will be available at 5:30 p.m. to provide information and answer questions about the project.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this project and encourage them to comment about their concerns.

If you are a landowner receiving this notice, a CE FLNG representative may contact you about the acquisition of an easement to construct, operate, and maintain the natural gas transmission pipeline facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the facilities, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, a condemnation proceeding could be initiated in a federal or state court where compensation would be determined in accordance with state law.

The ''For Citizens'' section of the FERC Web site (*www.ferc.gov*) provides more information about the FERC, the environmental review process, and LNG. This section also includes information about getting involved in FERC jurisdictional projects, and a citizens' guide entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need to Know?'' This guide addresses a number of frequently-asked questions including the use of eminent domain and how to participate in the Commission's proceedings.

Summary of the Planned Project

CE FLNG plans to construct and operate a LNG export terminal, and approximately 37 miles of 42-inch-diameter natural gas transmission pipeline in Plaquemines Parish, Louisiana. The LNG terminal would be located along the east bank of the Mississippi River at approximately mile marker 12.5, northeast of the community of Venice. CE FLNG plans to moor two self-propelled, natural gas liquefaction, storage, and offloading vessels at the terminal. The floating LNG (FLNG) vessels would each be about 1,100 feet long, 180 feet wide, and extend up to 80 feet above the waterline. The FLNG vessels would be capable of producing up to 8 million tons per annum of LNG and storing 250,000 cubic meters of LNG.

Approximately 80 to 130 LNG carriers (LNGC), with cargo capacities ranging from 125,000 to 170,000 cubic meters, would call upon the terminal each year during operation. CE FLNG plans to use tug boats to maneuver the FLNG vessels and LNGCs. During storm events, the vessels could leave the terminal for the Gulf of Mexico. A CE FLNG office would be located at the Venice Port Complex, and the tug boats would operate out of that port.

The planned transmission pipeline would connect the terminal to existing natural gas infrastructure facilities. The northern terminus of the pipeline would connect with a Tennessee Gas Pipeline Company pipeline and the southern pipeline terminus would connect with the Targa Gas Plant and Gulf South Pipeline Company, Texas Eastern Transmission Company, and Columbia Gulf Transmission pipelines.

The general locations of the planned facilities are shown in Appendix 1.[1]

Land Requirements

Constructing the LNG terminal along the east bank of the Mississippi River would require dredging approximately 125 acres of wetlands/open water. Additional lands and waters could be impacted by the establishment of safety zones for operation of the LNG terminal and LNGCs calling on the terminal. Any safety zones would be established by the U.S. Coast Guard-New Orleans Sector (Coast Guard) following a review of safety and security issues. CE FLNG is currently evaluating potential sites for dredge material placement. Dredge disposal would be authorized by the U.S. Army Corps of Engineers–New Orleans District (USACOE). Constructing the pipeline would require the temporary use of approximately 900 acres of wetland/open water, and the permanent use of approximately 225 acres of wetland/open water to maintain and operate the pipeline.

The EIS Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of an Order Granting Section 3 Authorization, and a Certificate of Public Convenience and Necessity under Section 7 of the Natural Gas Act (NGA). The NEPA also requires us [2] to discover and address concerns the public may have about proposals. This discovery process is commonly referred to as scoping. The main goal of the scoping process is to focus the analysis in the EIS on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to be addressed in the EIS. All comments received will be considered during the

[1] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, (202) 502–8371. For instructions on using eLibrary, refer to the last page of this notice.

[2] ''We'', ''us'', and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

preparation of the EIS, and addressed as appropriate.

In the EIS we will describe the impacts that could occur as a result of constructing and operating the planned project under these general headings:

- Geology and soils;
- water resources and wetlands;
- vegetation, fisheries and wildlife;
- threatened and endangered species;
- socioeconomics;
- land use and aesthetics;
- cultural resources;
- air quality and noise;
- public safety;
- navigation; and
- cumulative impacts.

We will also evaluate possible alternatives to the project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Although no formal application has been filed, we have already initiated our NEPA review under the Commission's pre-filing process. The purpose of the pre-filing process is to encourage early involvement of interested stakeholders and to identify and resolve issues before the FERC receives an application. As part of our pre-filing review, we have contacted several federal agencies and will also contact state agencies to discuss their involvement in the scoping process and the preparation of an EIS.

The EIS will present our independent analysis of the issues. We will publish and distribute a draft EIS for public comment. After the comment period, we will consider all timely comments and revise the document, as necessary, before issuing a final EIS. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section below.

The FERC is the lead federal agency in preparing the EIS to satisfy the requirements of the NEPA. With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues related to this project to formally cooperate with us in the preparation of the EIS.[3] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Currently, the U.S. Department of Energy-Office of Fossil Energy (DOE), the USACOE, and the Coast Guard have expressed their intention to participate as cooperating agencies in the preparation of the EIS to satisfy their NEPA responsibilities related to this project. The USACOE has jurisdictional authority pursuant to Section 404 of the Clean Water Act, which governs the discharge of dredged or fill material into waters of the United States, and Section 10 of the Rivers and Harbors Act, which regulates any work or structures that potentially affect the navigability of a waterway. The Coast Guard is the federal agency responsible for determining the suitability of waterways for LNG marine traffic. The Coast Guard exercises regulatory authority over LNG facilities that affect the safety and security of port areas and navigable waterways under Executive Order 10173, the Magnuson Act, the Ports and Waterways Safety Act, and the Maritime Transportation Security Act.

Involvement of U.S. Department of Energy

Under Section 3 of the NGA, the DOE would authorize applications to export natural gas, including LNG, unless it finds that the proposed export would not be consistent with the public interest. The purpose and need for DOE action is to respond to the application filed by CE FLNG on September 21, 2012 with the DOE (FE Docket No. 12–123–LNG), seeking authorization to export 1.07 billion cubic feet per day of domestic natural gas as LNG. CE FLNG requested to export LNG from its proposed terminal in Plaquemines Parish, Louisiana for a 30-year period commencing from the earlier of the date of first export or ten years from the date that the requested authorization was issued to any country: (1) That has, or in the future develops, the capacity to import LNG; and (2) with which trade is not prohibited by U.S. law or policy.

Notice of Floodplain Involvement

Because the planned project would involve actions in floodplains, in accordance with Title 10 of the Code of Federal Regulations, Part 1022, *Compliance With Floodplain and Wetland Environmental Review Requirements,* the EIS will include a floodplain assessment, as appropriate, and a floodplain statement of findings will be included in any DOE finding of no significant impact.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's regulations implementing Section 106 of the National Historic Preservation Act, we are using this notice to initiate consultations with the Louisiana State Historic Preservation Office (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[4] Staff will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project is more fully developed. For natural gas projects, the APE usually encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, access roads, and aboveground facilities). The EIS will document our findings on project-related effects on historic properties and summarize the status of Section 106 consultations.

Currently Identified Environmental Issues

Based on our preliminary review of the planned facilities and information provided by CE FLNG, we have identified several issues that we think deserve attention. This preliminary list of issues may be changed based on your comments and our ongoing environmental analysis. These issues are:

- Coastal zone management;
- wetland loss;
- dredging and dredge material placement;
- essential fish habitat;
- recreational and commercial fisheries;
- shipping traffic and marine safety;
- visual impacts;
- air quality;
- water use;
- socioeconomics; and
- public safety.

Public Participation

You can make a difference by providing us with your specific comments about the project. Your comments should focus on the potential environmental impacts, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are considered in a timely manner and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before January 6, 2014.

For your convenience, there are three methods you can use to submit your

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, 1501.6.

[4] The Advisory Council on Historic Preservation regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register for Historic Places.

comments to the Commission. In all instances, please reference the project docket number (PF13–11–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You can file your comments electronically using the *eComment* feature located on the Commission's Web site (*www.ferc.gov*) under the *Documents and Filings* heading. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can also file your comments electronically using the *eFiling* feature located on the Commission's Web site (*www.ferc.gov*) under the *Documents and Filings* heading. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.*'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Indian tribes; and local libraries and newspapers. This list also includes affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned project.

Copies of the draft EIS will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the EIS instead of the compact disc version, or if you would like to remove your name from the mailing list, please return the attached Information Request (Appendix 2).

Becoming an Intervenor

Once CE FLNG files its application with the Commission, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor can be found under the ''Getting Involved'' heading of the ''For Citizens'' section on the FERC Web site. Please note that the Commission will not accept requests for intervenor status at this time. You must wait until the Commission receives a formal application for the project.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC Web site (*www.ferc.gov*) using the eLibrary. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits (PF13–11). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: December 5, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–29600 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1510–017]

Kaukauna Utilities; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 1510–017.

c. *Date Filed:* October 7, 2013.

d. *Submitted By:* Kaukauna Utilities.

e. *Name of Project:* Kaukauna City Plant Hydroelectric Project.

f. *Location:* On the Lower Fox River, in Outagamie County, Wisconsin. No federal lands are occupied by the project works or located within the project boundary.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. Potential *Applicant Contact:* Mike Pedersen, Manager of Generation and Operations, Kaukauna Utilities, 777 Island Street, Kaukauna, WI 54130; phone: (920) 462–0220; email: *mpedersen@ku-wi.org.*

i. *FERC Contact:* Isis Johnson at (202) 502–6346; or email at *isis.johnson@ferc.gov.*

j. Kaukauna Utilities filed its request to use the Traditional Licensing Process on October 7, 2013. Kaukauna utilities provided public notice of its request on September 25, 2013. In a letter dated December 05, 2013, the Director of the Division of Hydropower Licensing approved Kaukauna Utilities' request to use the Traditional Licensing Process.

k. *With this notice, we are initiating informal consultation with:* (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402; (b) NOAA Fisheries under section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920; and (c) the Wisconsin State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Kaukauna Utilities as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act, section 305 of the Magnuson-Stevens Fishery Conservation and Management

Act, and section 106 of the National Historic Preservation Act.

m. Kaukauna Utilities filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov*, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). A copy is also available for inspection and reproduction at the address in paragraph h.

o. The licensee states its unequivocal intent to submit an application for a new license for Project No. 1510. Pursuant to 18 CFR 16.8, 16.9, and 16.10 each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by March 31, 2017.

p. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Dated: December 5, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–29601 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER14–506–000]

Biofuels Washington LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of Biofuels Washington LLC's application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and *Procedure* (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is December 26, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 5, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–29573 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER14–527–000]

Green Current Solutions, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of Green Current Solutions, LLC's application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability is December 26, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC

Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 5, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–29567 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER14–494–000]

South Bay Energy Corp.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of South Bay Energy Corp.'s application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and *Procedure* (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability is December 26, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 5, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–29572 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER14–479–000]

Great Bay Energy V, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of Great Bay Energy V, LLC's application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR. Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability is December 26, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 5, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–29571 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER14–519–000]

Astral Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of Astral Energy LLC's application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is December 26, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 5, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–29566 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD14–1–000]

Zero Rate Reactive Power Rate Schedules; Notice of Staff Workshop

This notice establishes the topics for discussion at the workshop directed by the Commission in *Chehalis Power Generating, L.P.,* Docket No. ER05–1056–007.[1] The workshop is intended to explore the mechanics of public utilities filing reactive power rate schedules for which there is no compensation. The workshop will be held on December 11, 2013 from 1:30 p.m. to 4 p.m. at the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The workshop will be led by Commission staff, with presentations from panelists. The questions to be discussed during this workshop are as follows:

- The most efficient way for public utilities to file their rates for reactive power rate schedules for which there is no compensation.
  - E.g., *pro forma* rate schedule, part of a transmission provider's tariff, EQR reporting, etc.
- Whether Articles 9.6.3 and 11.6 of the *pro forma* Large Generator Interconnection Agreement and Article 1.8 of the *pro forma* Small Generator Interconnection Agreement can be interpreted as already providing for a zero rate on file for reactive power service, including service that is within the deadband and/or outside the deadband.
- Whether there should be different filing requirements for different types of public utilities.
- Other questions regarding the mechanics of filing reactive power rate schedules.

The workshop will not be transcribed. However, there will be a free webcast of the workshop. The webcast will allow persons to listen to the workshop, but not participate. Anyone with Internet access who wants to listen can do so by navigating to the Calendar of Events at *www.ferc.gov* and locating the workshop in the Calendar. The Commission Web site's link to the workshop will contain a link to the webcast. The Capitol Connection provides technical support for the webcast. If you have questions, visit *www.CapitolConnection.org* or call 703–992–3100.[2]

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–208–8659 (TTY), or send a fax to 202–208–2106 with the required accommodations.

For more information about this conference, please contact: Sarah McKinley, Office of External Affairs, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8368, *sarah.mckinley@ferc.gov.*

Dated: December 5, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–29569 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

[1] *Chehalis Power Generating, L.P.,* 145 FERC ¶ 61,052 (2013).

[2] The webcast will continue to be available on the Calendar of Events on the Commission's Web site *www.ferc.gov* for three months after the workshop.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR14–10–000]

MarkWest Pipeline Company L.L.C.; Notice of Petition for Waiver

Take notice that on November 29, 2013, pursuant to Rule 202 of the Commission's Rules of Practices and Procedure, 18 CFR 385.202 (2013), MarkWest Pipeline Company L.L.C. (MarkWest Pipeline) requested that the Commission grant a temporary waiver of the Interstate Commerce Act (ICA) Section 6 and Section 20 tariff filing and reporting requirements applicable to interstate common carrier pipelines with respect to its natural gas liquids (NGL) pipeline.

Any person desiring to intervene or to protest in this proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern time on December 20, 2013.

Dated: December 5, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–29568 Filed 12–11–13; 8:45 am]

BILLING CODE 6717–01–P

EXPORT-IMPORT BANK

[Public Notice: 2013–0058]

Application for Final Commitment for a Long-Term Loan or Financial Guarantee in Excess of $100 Million: AP088406XX

AGENCY: Export-Import Bank of the United States.

ACTION: Notice.

SUMMARY: This Notice is to inform the public, in accordance with Section 3(c)(10) of the Charter of the Export-Import Bank of the United States (''Ex-Im Bank''), that Ex-Im Bank has received an application for final commitment for a long-term loan or financial guarantee in excess of $100 million (as calculated in accordance with Section 3(c)(10) of the Charter). Comments received within the comment period specified below will be presented to the Ex-Im Bank Board of Directors prior to final action on this Transaction.

DATES: Comments must be received on or before January 6, 2014 to be assured of consideration before final consideration of the transaction by the Board of Directors of Ex-Im Bank.

ADDRESSES: Comments may be submitted through Regulations.gov at *WWW.REGULATIONS.GOV.* To submit a comment, enter EIB–2013–0058 under the heading ''Enter Keyword or ID'' and select Search. Follow the instructions provided at the Submit a Comment screen. Please include your name, company name (if any) and EIB–2013–0058 on any attached document.

Reference: AP088406XX.

Purpose and Use:

Brief description of the purpose of the transaction:

To support the export of U.S.-manufactured commercial aircraft, spare engines and spare parts to Angola.

Brief non-proprietary description of the anticipated use of the items being exported:

To be used for long-haul air service between Angola and China, Brazil, Europe and South Africa.

To the extent that Ex-Im Bank is reasonably aware, the items being exported are not expected to produce exports or provide services in competition with the exportation of goods or provision of services by a United States industry.

Parties:

Principal Supplier: The Boeing Company and the General Electric Company.

Obligor: Linhas Aereas de Angola—TAAG Angola Airlines.

Guarantor(s): The Ministry of Finance of the Republic of Angola.

Description Of Items Being Exported: The items being exported are Boeing 777 aircraft, GE spare engines and spare parts.

Information On Decision: Information on the final decision for this transaction will be available in the ''Summary Minutes of Meetings of Board of Directors'' on *http://exim.gov/newsandevents/boardmeetings/board/.*

Confidential Information: Please note that this notice does not include confidential or proprietary business information; information which, if disclosed, would violate the Trade Secrets Act; or information which would jeopardize jobs in the United States by supplying information that competitors could use to compete with companies in the United States.

Cristopolis Dieguez,

Program Specialist, Office of the General Counsel.

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FEDERAL COMMUNICATIONS COMMISSION

[MB Docket No. 13–50; FCC No. 13–150]

Commission Policies and Procedures Under the Communications Act, Foreign Investment in Broadcast Licensees

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This Declaratory Ruling is intended to remove apparent uncertainty regarding Commission policies and procedures in reviewing broadcast applications for transfer of control, or requests for declaratory ruling, that seek greater than 25 percent indirect foreign ownership in the controlling U.S. parents of broadcast licensees pursuant to the Communications Act of 1934. The ruling clarifies that the Commission intends to evaluate any applications or proposed transactions that would exceed the statutory 25 percent benchmark on a case-by-case basis. The Declaratory Ruling responds to a request from a broad coalition of interested parties, including broadcasters, public interest groups and the financial sector, that the Commission clarify that it intends to exercise its statutory discretion to conduct a substantive, facts and circumstances evaluation of proposals seeking above-the-benchmark foreign investment.

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SUPPLEMENTARY INFORMATION: This Declaratory Ruling in MB Docket No. 13–50, FCC 13–150, was adopted and released on November 14, 2013. The complete text of the document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street SW., Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 12th Street SW., Washington, DC 20554. Customers may contact BCPI, Inc. at their Web site *http://www.bcpi.com* or call 1–800–378–3160. This document is also available on the Commission's Web site at *http://fcc.gov.*

Synopsis of the Declaratory Ruling

I. Introduction

1. This Declaratory Ruling issued pursuant to § 1.2 of the Commission's rules [1] is intended to remove apparent uncertainty about the Commission's policies and procedures for evaluating potential foreign investment in broadcast licensees under section 310(b)(4) of the Communications Act of 1934, as amended (the Act).[2] That section restricts foreign ownership or voting interests exceeding 25 percent of the capital stock in U.S.-organized entities that control broadcast (and certain other types of) Commission licensees, when the Commission finds that the imposition of such a limitation is in the public interest. As noted below, broadcasters, public interest groups, and others have expressed the view that it would be in the public interest to increase access to capital and investment financing for the broadcast sector. These parties assert that, as they read Commission precedent, the application of section 310(b)(4) to broadcast licensees has restricted the flow of foreign capital to domestic broadcast licensees or to entities interested in entering the broadcast

[1] 47 CFR 1.2. *See also* 5 U.S.C. 554(e).

[2] 47 U.S.C. 310(b)(4).

industry. They assert that foreign sources of capital would be available to broadcasters if section 310(b)(4) were not applied to block access to those sources. Some parties further believe that the benefits of increased capital from foreign investors would assist, among other beneficiaries, minorities, women, and small broadcast entities, for which access to capital is a particular impediment to market entry. In light of these stated concerns, we believe it useful to articulate and clarify the Commission's policies and procedures in reviewing applications or proposed transactions that propose foreign broadcast ownership that would exceed the 25 percent benchmark contained in section 310(b)(4) and to assure the broadcast industry and potential foreign investors that the Commission intends to consider such matters on a case-by-case basis.

II. Background

2. The Act's foreign ownership restrictions were originally conceived to address homeland security interests during wartime. They were designed to protect the integrity of ship-to-shore and governmental communications and thwart the airing of foreign propaganda on broadcast stations.[3] Nevertheless, those statutory provisions have always provided the Commission with the discretion to approve foreign ownership in broadcast licensees in excess of the 25 percent benchmark. Section 310 currently states in pertinent part:

> (b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—* * * (4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.[4]

3. The Commission has traditionally viewed the 25 percent benchmark for foreign ownership and voting interests in U.S.-organized entities that control broadcast licensees as the presumptive limit consistent with the public interest.[5] It has done so based on a determination that foreign ownership of broadcast stations presents different questions from those raised by foreign ownership in other types of radio spectrum licensees.[6] The Commission's approach to the benchmark for foreign investments in broadcast licensees has reflected heightened concern for foreign influence over or control of [broadcast] licensees which exercise editorial discretion over the content of their transmissions.[7] Over time, the Commission's approach to foreign investment in the common carrier context has resulted in the development of a body of precedent, rules, and procedures for transactions involving such carriers. The Commission has not been presented with a similar number of applications in the broadcast sector and therefore has not had the opportunity to develop its policies and procedures in this context.

4. A number of diverse interested parties have asked the Commission to review its policies and procedures regarding the assessment of applications or proposed transactions that would exceed the 25 percent threshold in section 310(b)(4) in the broadcast context. On August 31, 2012, the Coalition for Broadcast Investment (CBI) filed a ''Request for Clarification of the Commission's Policies and Procedures Under 47 U.S.C. 310(b)(4). Therein, CBI sought clarification that the Commission will exercise its statutory discretion to conduct a substantive, facts and circumstances evaluation of proposals for foreign investment in excess of 25 percent in the parent company of a broadcast licensee.[8] On February 26, 2013, the Media Bureau issued a public notice inviting comment on the CBI Request. The Commission received nine comments and five reply comments, the majority of which support CBI's position.[9]

5. CBI asserts that the Commission, for over 80 years, has failed to exercise

[3] *See, e.g., Radio Communications: Hearing on S. 3620 and S. 5334 Before the House Commerce Committee,* 62nd Cong 35–37 (Mar. 1, 1912) (adopting predecessor language to section 310). *See also Fox Television Stations, Inc.,* 10 FCC Rcd 8452 (1995) *(Fox I); Wilner & Scheiner,* Request for Declaratory Ruling Concerning the Citizenship Requirements of Section 310(b)(3) and (4) of the Communications Act of 1934, 103 FCC 2d 511, 516–17 (stating that . . . Section 310(b) reflects the broader purpose of 'safeguard[ing] the United States from foreign influence' in the field of broadcasting. The specific citizenship requirements governing positional, ownership and voting interests reflect a deliberate judgment on the part of Congress as to the limitations necessary to prevent undue alien influence in broadcasting.) (1985) (*Wilner & Scheiner*); *Request for Declaratory Ruling Concerning section 310(a)(5) of the Communications Act,* 67 FCC 2d 604 (1974) (the prior section 310(a)(5) is now section 310(b)(4)). *See also* Letter from Mace Rosenstein and Gerard J. Waldron, Counsel for the Coalition for Broadcast Investment (CBI), to Marlene H. Dortch, Secretary, Federal Communications Commission at 2 (Aug. 31, 2012) (CBI Request); Nexstar Broadcasting, Inc. Comments at 2 (Nexstar).

[4] 47 U.S.C. 310(b)(4). The officer and director thresholds originally contained in section 310(b)(4) were eliminated by Section 403(k) of the Telecommunications Act of 1996, Public Law 104–104, 110 Stat 56 (1996); *see also Implementation of section 403(k) of the Telecommunications Act of 1996* (Citizenship Requirements), 61 CFR 55579–01, Oct. 28, 1996 (FCC 96–396) (amending Commission rules, 47 CFR parts 20, 21, 22 and 101 (Communications common carriers, Radio); and 47 CFR parts 24, 26, 80, 87, 90 and 100 (Radio).

[5] Traditionally, the Commission has considered the type of radio license at issue in assessing whether foreign ownership in excess of the benchmark would serve the public interest. *See, e.g., Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under section 310(b)(4) of the Communications Act of 1934, As Amended,* IB Docket No. 11–133, Notice of Proposed Rulemaking, FCC 11–121, 26 FCC Rcd 11703, 11704 n.3 (2011) (*Foreign Ownership NPRM*) (noting that the Commission historically has recognized different policy concerns for foreign ownership in the U.S.-organized parents of broadcast licensees under section 310(b)(4)); *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, As Amended,* IB Docket No. 11–133, First Report and Order, FCC 12–93, 27 FCC Rcd 9832, 9834 n.11 (2012) (same) (*Foreign Ownership First Report and Order*); *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, As Amended,* IB Docket No. 11–133, Second Report and Order, FCC 13–50, 28 FCC Rcd 5741, 5742 n.4 (2013) (*Foreign Ownership Second Report and Order*), citing to *Foreign Ownership NPRM* at 11704 n.3. For example, the Commission has noted common carrier radio licenses are passive in nature and confer no control over the content of transmissions. Broadcast transmissions have been found to present additional national security concerns because they implicate content. *See, e.g., Foreign Ownership NPRM,* 26 FCC Rcd at 11704 n.3, citing *Cable & Wireless, Inc.,* Declaratory Ruling and Memorandum Opinion, Order, Authorization, and Certificate, 10 FCC Rcd 13177, 13179, para. 18 (1995); *Market Entry and Regulation of Foreign-Affiliated Entities,* Notice of Proposed Rule Making, 10 FCC Rcd 4844, 4852 n.19 and accompanying text (1995) (*Market Entry NPRM*).

[6] *Market Entry and Regulation of Foreign-Affiliated Entities,* Report and Order, 11 FCC Rcd 3873, 3947 (1995) (*Market Entry Order*) (Commission determination not to adopt an effective competitive opportunities (ECO) approach for broadcast foreign ownership similar to that applied in common carrier section 310 evaluations). *See also supra* note 5.

[7] *Market Entry NPRM,* 10 FCC Rcd at 4884 paragraph 99.

[8] CBI Request at 1; *see also* CBI May 28, 2013, Ex Parte at 1. CBI members comprise national broadcast networks, radio and television station licensees, and community and consumer organizations.

[9] *Media Bureau Announces Filing of Request for Clarification of the Commission's Policies and Procedures Under 47 U.S.C. 310(b)(4) by the Coalition for Broadcast Investment,* MB Docket No. 13–50, Public Notice, 28 FCC Rcd 1469 (MB 2013). Comments were filed by Adelante Media Group, Nexstar Broadcasting, Inc., Asian American Justice Center, Minority Media and Telecommunications Council, National Association of Broadcasters, National Association of Media Brokers, Dale A. Ganske, Bradley L. Gould and David A. Schum. Reply comments were filed by CBI, National Association of Broadcasters, Alaska Broadcast Communications, Inc. *et al.,* Wiley Rein LLP, and National Association of Black Elected Legislative Women. *See also* Letter from Sen. Harry Reid (D-Nevada) to Julius Genachowski, FCC Chairman (June 8, 2012); Letter from Sen. Charles Schumer (D–New York) to Julius Genachowski, FCC Chairman (July 2, 2012). Senators Reid and Schumer support a case-by-case review process for foreign broadcast investments and coordination of national security reviews with Executive Branch agencies.

its authority and discretion to permit foreign ownership interests in entities that control the licensees of broadcast radio or television stations in excess of the 25 percent benchmark. It is commenters' view that the Commission ''maintains an irrebutable presumption'' against relief from the 25 percent restriction, which inhibits financial institutions and other investors from considering broadcast transactions where the 25 percent benchmark would be surpassed and frustrates the public interest. CBI contends that by confirming its intention to exercise the discretion afforded the agency by the plain language of the statute the Commission can ease the path for new broadcast entrants, while enabling existing broadcasters to offer expanded, innovative services. National Association of Media Brokers (NAMB) indicates that banks from Canada and Europe have expressed their interest in making equity investments in U.S. broadcast stations but that the alien ownership limitations in section 310(b)(4) of the Act, as applied to the broadcast industry, have limited their participation. Broadcasters support CBI's request for clarification as a way to attract new sources of capital to their industry.

6. Commenters also highlight the fact that the Commission adjusted its policies and procedures involving common carrier licensees over 15 years ago to authorize foreign investment in excess of the statutory benchmark in order to encourage a more open and competitive U.S. telecommunications market. Commenters attribute globalization, growth and innovation in the telecommunications sector to that Commission decision. NAB adds that the Commission has issued approximately 150 section 310(b)(4) rulings authorizing foreign investment in U.S. telecommunications carriers exceeding the 25 percent statutory benchmark. By comparison, in the view of industry commenters, the Commission's inflexibility in its review of broadcast foreign investment over the 25 percent benchmark has deprived the broadcast sector of available capital.

7. Several commenters remark that the media landscape has evolved significantly since section 310 was enacted and that those changes eliminate the need to restrict foreign ownership in broadcast licensees to 25 percent. CBI member Adelante Media Group states that imposition of the limit on broadcasters is unfair because broadcasters must compete against distribution platforms that are not subject to the same statutory policy—Netflix, Apple, Google, Twitter, multichannel video program distributors, and pay TV networks.[10] Others concur,[11] stating that wireless carriers and cable operators have seen significant capital investments from foreign interests while broadcasters have been denied those same opportunities. Wiley Rein LLP similarly contends that a revised foreign investment policy for broadcasting would correct the current marketplace distortion that exists between broadcasters and their competitors in other services. NAB states that today's security concerns stem principally from the possibility that foreign interests will engage in cyber-warfare over wired and wireless communications networks, not from the possibility of editorial control over broadcast transmissions.

8. CBI maintains that a regulatory infrastructure exists that is sufficient for the Commission to evaluate broadcasters' foreign investment proposals. They recommend that the Commission utilize the procedures already in place with respect to proposed common carrier foreign ownership to coordinate with the relevant Executive Branch agencies on any issues related to national security, law enforcement, foreign policy, or trade policy with respect to particular applications or proposed transactions that would exceed 25 percent foreign investment in the controlling U.S. parents of telecommunications entities. CBI notes that, pursuant to current procedures, the Commission regularly refers requests for section 310(b)(4) declaratory rulings involving such proposed investments in common carriers to the relevant Executive Branch agencies with expertise in national security matters. CBI suggests that a similar process would ensure that broadcast transactions that propose foreign investment over the 25 percent benchmark would receive national security review.

9. NAB and other commenters observe that Congress and the Commission have long recognized lack of access to capital as a leading barrier to increased ownership opportunities for small businesses, including women and minorities, in broadcasting and other communications sectors.[12] Commenters in other Commission proceedings have raised similar concerns. For example, in the current quadrennial review of broadcast ownership rules, Diversity and Competition Supporters [13] request that the Commission relax its foreign ownership policies pursuant to section 310(b)(4) to provide new funding options for minority broadcast entrepreneurs . . . and give all U.S. broadcasters the opportunity to increase their investments in foreign broadcast outlets.[14] Diversity and Competition Supporters (DCS) includes 50 trade, civil rights, legislative and scholarly organizations. Furthermore, in its comments in this proceeding, Minority Media and Telecommunications Council (MMTC), on behalf of 31 national minority and civil rights organizations, states that encouraging foreign investment in broadcasting would create ''reciprocal opportunities'' for American broadcasters to expand their footprints into radio and television markets in regions and countries such as Central and South America, China,

[10] Adelante Comments at 2. Adelante Media Group specializes in Spanish language radio and television broadcasting in emerging Hispanic markets, owning and operating 18 radio stations in nine markets. Jay Meyers, Chief Executive Officer of Adelante, is also President and CEO of Broadcast Management and Technology, a firm that consults with financial institutions and broadcast owners. Adelante Comments at 1–2; *see also Nexstar Comments at 2–3; AJT Joint Reply Comments at 3–4 n.11 (citing Statement of Ajit Pai, Commissioner, Federal Communications Commission, Hearing Before the Committee on Commerce, Science, and Transportation of the United States Senate, Oversight of the Federal Communications Commission,* 2013 WL 987095 *11 (Mar. 12, 2013); Wiley Rein Reply Comments at 4.

[11] *See, e.g.,* NAB Reply Comments at 2 n.4, citing *Foreign Ownership Second Report and Order,* Statement of Commissioner Jessica Rosenwercel (available at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0418/FCC-13-50A4.pdf*) and Statement of Commissioner Ajit Pai (available at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0418/FCC-13-50A5.pdf*).

[12] Asian American Justice Center Comments at 1; CBI Request at 4; *see also* NAB Comments at 5 n.13 (the Commission has previously recognized that the primary impediment to the participation of women and minorities in spectrum-based services is lack of access to capital, caused by factors which include higher costs in raising capital and lending discrimination).

[13] Diversity and Competition Supporters (DCS) includes 50 trade, civil rights, legislative and scholarly organizations. *See* Initial Comments of the Diversity and Competition Supporters in Response to the Notice of Proposed Rulemaking, *2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to section 202 of the Telecommunications Act of 1996, Promoting Diversification of Ownership in the Broadcasting Services,* MB Docket Nos. 09–182, 07–294 (DCS Initial Comments).

[14] *See* DCS Initial Comments at 24. Several commenters in that proceeding broadly endorsed DCS' proposal that the Commission relax foreign ownership policies. *See* Reply Comments of Tribune Company, Debtor-in-Possession, MB Docket Nos. 09–182, 07–294 at 41–42; Bonneville/Scranton Reply to the Report on Ownership of Commercial Broadcast Stations, MB Docket Nos. 09–182, 07–294 at 13 (323 Report); *see also* NAB 323 Report Reply at 3. *See also* Azteca: Raise Foreign Ownership Limits, by Harry A. Jessell, TV Newscheck (July 13, 2010) (Azteca International Corp. urges the Commission to relax foreign ownership rules to allow foreign companies to own up to 51 percent of U.S. broadcasting companies).

Korea, and Australia.[15] These groups maintain that relaxing the strict interpretation and application of section 310(b)(4) is one of the most significant steps the Commission can take to reverse the decline in minority broadcast ownership.[16] Commenters, including Adelante and NAMB, assert that access to additional capital will support the creation of more programming aimed at racial and ethnic minorities and bilingual speakers, and foster new entrants into broadcast ownership.[17]

III. Discussion

10. We believe the broadcast industry, the financial sector, and ownership diversity advocates will each benefit from a fresh statement of our policy and procedures governing Commission review under section 310(b)(4) of the Act of proposals for foreign investment exceeding the 25 percent benchmark in U.S.-organized entities that control broadcast licensees. We acknowledge commenters' common position that changes have occurred in the media landscape and marketplace since the foreign ownership restriction was enacted and that limited access to capital is a concern in the broadcast industry, especially for small business entities and new entrants, including minorities and women. We read the plain language of the statute as providing us the opportunity to review on a case-by-case basis applications for approval of foreign investment in the controlling U.S. parent of a broadcast licensee above the 25 percent benchmark. Such applications may be granted unless the Commission finds that a denial will serve the public interest. In light of the concerns many commenters raised, we believe that a clear articulation of the Commission's approach to section 310(b)(4) in the broadcast context has the potential to spur new and increased opportunities for capitalization for broadcasters, and particularly for minority, female, small business entities, and new entrants.[18] Greater capitalization may in turn yield greater innovation, particularly in programming directed at niche or minority audiences.

11. Section 310(b)(4) of the Act authorizes us to evaluate whether or not, in a particular situation, it is in the public interest to permit an entity to obtain or to hold a station license notwithstanding the fact that the alien interest in the U.S. parent of the station licensee would exceed the statutory benchmark—and to make such determinations on a case-by-case basis.[19] Congress' directive is that 25 percent alien ownership is the point at which the Commission must act and exercise its discretion in making a public interest determination on proposed ownership arrangements that would exceed this level.[20] Congress entrusts to the Commission the discretion to reject alien voting or ownership above the benchmark if the Commission finds that the public interest would be served by the refusal of the transaction which would confer a greater than 25 percent alien interest in the controlling U.S. parent of a domestic broadcast license or by the revocation of the licenses involved. The Commission's decision in such cases is based on the specific facts and unique circumstances presented by each application before it. The bulk of the Commission's precedent under section 310(b)(4) has involved foreign investment in the controlling U.S. parents of telecommunications carriers, not broadcast station licensees.[21] To the extent that the Commission's past practice may have been interpreted as precluding case-by-case review of applications involving foreign investment in the controlling U.S. parents of broadcast licensees, as some commenters have suggested, we take this occasion to clarify that the contrary is true. We have given, and will continue to give, the fact-specific, individual case-by-case review the statute calls for to applications involving broadcast stations. As we have previously concluded with respect to the application of section 310(b)(4) in broadcast cases, the 25 percent benchmark is only a trigger for the exercise of our discretion, which we then exercise based upon a more searching analysis of the circumstances in each case.[22]

12. The Commission has not interpreted the benchmark as a permissive threshold that would allow foreign investors to hold more than 25 percent interests in the controlling U.S. parents of licensees absent Commission action.[23] Rather, under the Commission's precedent the 25 percent benchmark set forth in section 310(b)(4) of the Act has been applied to restrict foreign ownership of the controlling U.S. parents of broadcast licensees absent an affirmative Commission finding in a particular case that such ownership is in the public interest. The parties to this proceeding have not asked us to reconsider this precedent. Thus, we reiterate that, under this precedent, applicants may not exceed the section 310(b)(4) benchmark absent the express prior consent of the Commission. To exercise the statute's discretion in a meaningful way, the Commission must receive from the applicant detailed information sufficient for the agency to make the public interest finding required by the statute.[24]

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[15] Comments of MMTC on behalf of Thirty-one Civil Rights Organizations at 1; *see also* CBI Reply Comments at 1, 5; Asian American Justice Center Comments at 1; Letter from Margaret L. Tobey, Vice President for Regulatory Affairs, NBC Universal, to Marlene H. Dortch, FCC Secretary (Nov. 7, 2013) (the Declaratory Ruling . . . could help U.S. broadcast companies gain greater access to foreign media markets).

[16] Comments of MMTC on behalf of Thirty-one Civil Rights Organizations at 1; *see also* National Organization of Black Elected Legislative Women Reply Comments at 2. *But see* Letter from Lauren M. Wilson, Policy Counsel, Free Press, to Marlene H. Dortch, FCC Secretary (Nov. 7, 2013) (raising concerns about the availability of foreign investment for new entrants and smaller broadcasters).

[17] Adelante Comments at 2; NAMB Comments at 4; NAB Reply Comments at 3.

[18] We also hope that clarifying our policy regarding foreign investment will encourage other countries to liberalize restrictions on investment in their media markets and pave the way for greater U.S. investment opportunities in those markets.

[19] *See, e.g., Wilner & Scheiner,* 103 FCC 2d at 524 (clarifying, *inter alia,* that limited partnership interests are within the scope of section 310(b)).

[20] The statutory benchmark reflects Congress' judgment of the point at which foreign ownership and voting may conflict with the national interest. *Fox Television Stations Inc.,* 11 FCC Rcd 5714, 5722 (1995); *see also Univision Holdings, Inc. (Transferor) and Perenchio Television, Inc. (Transferee) for Transfer of Control of Univision Station Group, Inc., Licensee of Television Station Group Inc.,* 7 FCC Rcd 6672 (1992) (examining alien *de facto* control and real-party-in-interest issues for section 310(b)(4) compliance).

[21] *See, e.g., supra* note 5; *see also Foreign Ownership Second Report and Order,* 28 FCC Rcd 5741.

[22] *Fox I,* 10 FCC Rcd at 8472. *See also GRC Cablevision Inc.,* 47 FCC 2d 467, 468 paragraph 6 (1974) (alien ownership in broadcast television presents different questions which we will deal with as they arise in concrete situations.).

[23] *Fox I,* 10 FCC Rcd at 8745–46 (stating that . . . [T]he Commission must be given the opportunity to make a public interest determination specifically focused upon the implications of exercising its discretion before an ownership structure above the foreign ownership benchmark is vested with corporate prerogatives over a Commission licensee.); Galesburg Broadcasting Company, Notice of Apparent Liability for Forfeiture, 6 FCC Rcd 2210, 2210 (1991) (*Galesburg*) (finding that the transfer of a majority of the voting stock in the U.S.-organized parent of the licensee to a trustee wholly owned by a Canadian bank without prior Commission approval deprived the Commission of the opportunity to pass on the propriety of alien ownership which section 310(b)(4) of the Act contemplates). *See also Foreign Ownership First Report and Order,* 27 FCC Rcd at 9843 n.58; *Foreign Ownership Second Report and Order,* 28 FCC Rcd at 5759, n.98 (both citing to *Fox I* and *Galesburg* for the same proposition).

[24] *Fox I,* 10 FCC Rcd at 8476–77; *Galesburg Broadcasting Company,* 6 FCC Rcd at 2210; *compare In re Hispanic Broadcasting Corp.,* 18 FCC Rcd 18834 (2003) (finding that the equity and voting interests held by foreign entities in Univision comply with the alien ownership restrictions set

13. Applicants seeking approval of broadcast assignments or transfers must continue to inform the Commission of their proposed transaction's compliance with section 310 of the Act.[25] For example, Section III, Question 9 of Form 314 requires proposed assignees to certify their compliance with the provisions of section 310 relating to interests of aliens and foreign governments. Applicants must continue either to certify that their transactions will comply with section 310 benchmarks or, in the event they will not, to indicate that they will not comply and provide an explanatory exhibit.[26] A petition for declaratory ruling to allow foreign ownership to exceed the 25 percent benchmark must be filed along with any application in which the applicant cannot certify compliance with section 310(b)(4).[27] Again, in all cases, before the benchmark may be exceeded, we must approve the transaction.

14. We also clarify that, prospectively, if a proposed foreign investment in a broadcast licensee's controlling U.S. parent would exceed the benchmark but does not require the filing of a Form 314 or other FCC application, a petition for declaratory ruling must be filed with the Commission in advance. We expect to process Form 314 and other applications, as well as petitions for declaratory rulings in this category, in a similar manner for purposes of section 310(b)(4) review. Following preliminary staff review to ensure completeness of the filing materials, both types of submissions will be subject to public notice seeking comment from interested parties. The Commission will coordinate as necessary and appropriate with Executive Branch agencies regarding such applications and petitions. Consistent with the Commission's long-standing policy in reviewing foreign ownership of common carrier applicants and licensees, the Commission will continue to afford appropriate deference to the expertise of the Executive Branch agencies on issues related to national security, law enforcement, foreign policy, and trade policy.[28] As part of its review, the Commission may send the applicants or petitioners letters of inquiry or document requests, request additional materials, or take any other needed measures in order to conduct a comprehensive public interest review. Once the Commission has concluded its inquiry, it will release a written opinion or other notice authorizing, denying, or conditioning the requested foreign ownership.[29]

15. We expect to evaluate proposals on the basis of our body of decisions relating to broadcast ownership and foreign ownership and the framework set forth in this item, evaluating the facts as they are presented in each specific application or petition for declaratory ruling.[30] By their nature, these case-by-case reviews will lead to distinct, factually driven results. Each application or petition will be assessed on its own merits, and we will determine, given the particular circumstances presented in a particular case, whether the public interest would be served by permitting the requested foreign ownership. We anticipate that applicants may propose ownership by a range of foreign interests and countries, involving varying corporate and organizational structures, with differing public interest showings. Although many commenters have suggested that there is significant availability of foreign capital for broadcasters, we cannot predict whether applications proposing new foreign investment will in fact increase. If they do increase, over time, the Commission's case-by-case review may suggest policy issues or streamlined procedural mechanisms that could be addressed in future Commission proceedings. We may in the future elect to create a standardized review process similar to that adopted in the common carrier context.[31] At this time, however, we are cognizant of the distinctions between common carrier facilities and broadcast stations and of the differences in the Commission's experiences with proposals to exceed the section 310(b)(4) benchmark for

forth in section 310 of the Communications Act). *See also Foreign Ownership Second Report and Order,* 28 FCC Rcd at 5759 (confirming the Commission's long-standing policy that the statute requires us to review and approve foreign ownership of licensees subject to section 310(b)(4) before that foreign ownership exceeds the 25 percent statutory limit).

[25] *See* FCC Form 314—Application for Consent to Assignment of Broadcast Station Construction Permit or License, Section III, Question 9, Alien Ownership and Control (Oct. 2012) (available at *http://transition.fcc.gov/Forms/Form314/314.pdf*); FCC Form 315—Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, Section IV, Question 11, Alien Ownership and Control (Oct. 2012) (available at *http://transition.fcc.gov/Form/Form315/315.pdf;* FCC Form 316—Application for Consent to Assign Broadcast Station Construction Permit or License or Transfer of Control of Entity Holding Broadcast Station Construction Permit or License, Section III, Question 10, Alien Ownership and Control (June 2010) (available at *http://transition.fcc.gov/Forms/Form316/316.pdf*).

[26] We use the long-form broadcast assignment application, FCC Form 314, as an example. The same standard would apply whenever compliance with the alien ownership provisions or certification to such compliance arises. *See, e.g., supra* note 25.

[27] 47 CFR 1.2(a) (the Commission may on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty).

[28] *See generally Foreign Ownership Second Report and Order,* 28 FCC Rcd at 5751 paragraph 13, 5762 paragraph 34; *see also Rules and Policies on Foreign Participation in the U.S. Telecommunications Market: Market Entry and Regulation of Foreign Affiliated Entities,* IB Docket Nos. 97–14 and 95–22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23920 para. 63 (1997) (*Foreign Participation Order*) (We thus will continue to accord deference to the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy that are relevant to an application pending before us.); *see also Market Entry Order,* 11 FCC Rcd at 3955 para. 219. We anticipate that we may further develop our broadcast foreign ownership policies and procedures as we conduct our case-by-case reviews of particular applications and petitions and as we coordinate such filings with the appropriate Executive Branch agencies.

[29] *See, e.g., Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent To Assign AWS–1 Licenses, Applications of Verizon Wireless and Leap for Consent To Exchange Lower 700 MHz, AWS–1, and PCS Licenses, Applications of T-Mobile License LLC and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign Licenses,* WT Docket No. 12–4, Memorandum Opinion and Order and Declaratory Ruling, FCC 12–95, 27 FCC Rcd 10699, 10769 paragraphs 191–92 (2013), *pet. for recon. pending* (conditioning grant of applications to assign licenses and grant of declaratory ruling to Verizon Wireless on its compliance with the terms and conditions contained in the March 27, 2008, Letter to Stewart Baker, Assistant Secretary of Policy, U.S. Department of Homeland Security; and conditioning grant of applications to assign licenses to T-Mobile License on its compliance with the terms contained in the National Security Agreement entered into on January 12, 2001, as amended as of January 4, 2008, between Deutsche Telekom and the U.S. Department of Justice, the Federal Bureau of Investigation, and the U.S. Department of Homeland Security).

[30] We will not entertain petitions to exceed the foreign ownership limits of section 310(b)(3) for foreign investment in broadcast licensees. Foreign interests in a U.S.-organized parent that controls a licensee are subject to section 310(b)(4), not section 310(b)(3). Unlike section 310(b)(4), section 310(b)(3) does not afford the Commission any discretion to approve foreign investment in broadcast licensees in excess of the limitations contained therein. While the Commission has statutory authority to forbear from applying any regulation or provision of the Act to a telecommunications carrier or service if the Commission determines that forbearance is in the public interest, that authority is limited to application of those requirements to telecommunications carriers or services. *See* 47 U.S.C. 160. It does not extend to broadcast station licensees covered by section 310(b)(3). *Foreign Ownership Second Report and Order,* 28 FCC Rcd at 5749 paragraph 9 n.31. *See also Foreign Ownership First Report and Order,* 27 FCC Rcd 9832 (adopting forbearance from applying the section 310(b)(3) limit to the class of common carrier licensees in which foreign ownership in the licensee is held through U.S.-organized entities that do not control the licensee, to the extent the Commission determines such foreign ownership is consistent with the public interest under the policies and procedures the Commission has adopted for the public interest review of foreign ownership subject to section 310(b)(4) of the Act).

[31] *See Foreign Ownership Second Report and Order,* 28 FCC Rcd 5741 (codifying policies and procedures for authorizing foreign ownership of common carrier, aeronautical en route, and aeronautical fixed radio station licensees under section 310(b)). *See also Foreign Participation Order,* 12 FCC Rcd at 24033 paragraph 323.

foreign investments in these two categories of Commission licensees. Therefore, we believe it is appropriate that our review of proposed broadcast investments remain on a case-by-case basis and be allowed to mature before we consider comprehensive rules and procedures similar to those applicable to foreign investment in common carrier licensees.[32]

16. Some commenters have asserted that the underlying national security rationale for section 310(b)(4) in the broadcast area, protection from foreign propaganda on radio and television stations, no longer exists. Although many new potential threats and national security issues have arisen as technology has advanced,[33] we do not believe that the historical statutory concern for foreign influence over broadcast stations has disappeared. Broadcast stations are licensed to serve the needs and interests of local U.S. communities. They uniquely offer a range of critical information services to the American public, including, for instance, the provision of local, state, national, and international news, national Emergency Alerts, local severe weather alerts, Amber Alerts for missing children, and homeland security information. Ensuring that the ownership of broadcast licensees serves the public interest is embodied in a statutory directive with which we must faithfully comply and we will evaluate applications proposing foreign broadcast ownership accordingly. In particular, we will address each specific situation in terms of its potential public interest benefits and any relevant public interest concerns, including national security concerns, consistent with the statute and this Declaratory Ruling.

IV. Ordering Clause

17. Accordingly, *it is ordered* that, pursuant to the authority contained in sections 4(i) and 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 310(b), 5 U.S.C. 554(e) and § 1.2 of the Commission's rules, 47 CFR 1.2, this Declaratory Ruling in MB Docket No. 13–50 *is adopted.*

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–29698 Filed 12–11–13; 8:45 am]

BILLING CODE 6712–01–P

[32] Some commenters raise additional suggestions for Commission review of foreign investment in broadcast licensees. Although many of these recommendations proffer thoughtful contributions to the proceeding record, it is premature to adopt them at this time. Our consideration of the numerous overarching issues involved in this area is ongoing. As we continue to address applications on a case-by-case basis, we will ascertain whether it is appropriate to conduct a rulemaking proceeding.

[33] *See, e.g.,* Confidential Reports List U.S. Weapon System Designs Compromised by Chinese Cyberspies, by Ellen Nakashima, The Washington Post (May 27, 2013).

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

AGENCY: Federal Election Commission.

DATE AND TIME: Tuesday, December 17, 2013 at the conclusion of the open meeting and its continuation on Thursday, December 19, 2013 at 10:00 a.m.

PLACE: 999 E Street NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

* * * * *

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Shelley E. Garr,

Deputy Secretary of the Commission.

[FR Doc. 2013–29757 Filed 12–10–13; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

AGENCY: Federal Election Commission.

DATE AND TIME: Tuesday, December 17, 2013 at 10:00 a.m.

PLACE: 999 E Street NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes for November 14, 2013;

Correction and Approval of Minutes for November 21, 2013;

Audit Division Recommendation Memorandum on the North Dakota Republican Party (NDRP) (A11–11);

Agency Procedure for Notice to Named Respondents in Enforcement Matters of Additional Material Facts and/or Additional Potential Violations;

Proposed Directive re: Information Sharing with Other Law Enforcement Agencies;

2013 Legislative Recommendations;

Meeting Dates;

Election of Officers;

Management and Administrative Matters.

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Shawn Woodhead Werth, Secretary and Clerk, at (202) 694–1040, at least 72 hours prior to the meeting date.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Shelley E. Garr,

Deputy Secretary of the Commission.

[FR Doc. 2013–29758 Filed 12–10–13; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL MARITIME COMMISSION

Notice of Request for Additional Information

The Commission gives notice that it has formally requested that the parties to the below listed agreement provide additional information pursuant to 46 U.S.C. 40304(d). This action prevents the agreement from becoming effective as originally scheduled. Interested parties may file comments within fifteen (15) days after publication of this notice in the **Federal Register**.

Agreement No.: 012230.

Title: P3 Network Vessel Sharing Agreement.

Parties: A.P. Moller-Maersk A/S trading under the name Maersk Line; CMA CGM S.A.; and MSC Mediterranean Shipping Company, S.A.

By Order of the Federal Maritime Commission.

Dated: December 6, 2013.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2013–29599 Filed 12–11–13; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[30Day–14–13AIM]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the

Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Chemical Emergencies Audience Analysis—New—Agency for Toxic Substances and Disease Registry (ATSDR).

Background and Brief Description

The National Center for Environmental Health (NCEH) and the Agency for Toxic Substances and Disease Registry (ATSDR) play a vital role in mitigating chemical-related risks to public health. As part of that role, both agencies are responsible for assessing, minimizing, and monitoring risks to public health, and are tasked with providing trusted, accurate health information to the public. Given that both agencies are under the same leadership, information collected to inform health communications will be of value to both agencies.

The Office of Communications is seeking a one-year OMB-approval for an initiative to increase the effectiveness of the agencies' communications related to both unintentional and intentional chemical releases. In order to inform the development of messages and materials, the Office of Communications would like to understand the knowledge, attitudes, and behaviors (KAB) of key professional audiences who are involved in the immediate aftermath of chemical emergencies. In consultation with Subject Matter Experts, the Office of Communications prioritized the following professional audiences for this research:

- First responders, including police, fire fighters and emergency medical service workers
- Emergency department personnel, both clinical and non-clinical
- Environmental and public health professionals at the city, county and state levels
- Poison Control Center directors and staff

This information collection seeks to characterize what these key professionals know and believe about chemical emergency events, what related activities and behaviors they engage in or would engage in, what information these audiences want, and what their challenges and concerns are.

This information collection seeks approval to obtain data using two qualitative data collection methods. The first method includes focus groups to explore the KAB of members of these key professions in a group setting, allowing for dialogue between participants to provide the Office of Communications with in-depth information about this complex topic. Focus groups will take place remotely using Webinar technology, and participants will join the discussion by telephone. Although the Recruitment Screeners vary by respondent type, the same Moderator's Guide will be used for all focus groups. The second part of this information collection will include individual interviews with state-level environmental health professionals and Poison Control Center directors. Individual interviews will allow the agencies to gather in-depth information about state-level response structures and Poison Control Centers. Interviews will take place by telephone. To help ensure that participants have some experience responding to chemical emergencies, participants will be recruited from five states with the highest number of chemical emergencies, and within those states, from the areas where the highest number of incidents have occurred.

There are no costs to respondents other than their time. The total estimated annual burden hours are 138 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hrs.)
First responders	Focus Group Recruitment Screener	72	1	5/60
	Focus Group Moderator Guide	36	1	1
Emergency department personnel	Focus Group Recruitment Screener	72	1	5/60
	Focus Group Moderator Guide	36	1	1
County or city environmental health professionals.	Focus Group Recruitment Screener	36	1	5/60
	Focus Group Moderator Guide	18	1	1
Poison Control Center staff	Focus Group Recruitment Screener	36	1	5/60
	Focus Group Moderator Guide	18	1	1
State environmental health professionals	Interview Recruitment Screener	7	1	5/60
	Interview Guide	5	1	1
Poison Control Center directors	Interview Recruitment Screener	7	1	5/60
	Interview Guide	5	1	1

LeRoy Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–29695 Filed 12–11–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Title: Head Start Family and Child Experiences Survey (FACES).

OMB No.: 0970–0151.

Description: The Office of Planning, Research and Evaluation (OPRE), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is proposing to collect data for a new round of the Head Start Family and Child Experiences Survey (FACES). Featuring a new ''Core Plus'' Study design, FACES 2014–2018 will provide data on a set of key indicators, including information for performance measures, more rapidly and with greater frequency (Core Studies) and serve as a vehicle for studying more complex issues and topics in greater detail and with increased efficiency (Plus Studies). In fall 2014 and spring 2015, FACES will assess the school readiness skills of 2,400 Head Start children, survey their parents, and ask their Head Start teachers to rate children's social and emotional skills. In spring 2015 and again in spring 2017, the number of programs in the FACES sample will increase from the 60 that are used to collect data on children's school readiness outcomes to 180 for the purpose of conducting observations in 720 Head Start classrooms. Program director, center director, and teacher surveys will also be conducted in the spring. Plus features include additional survey content of policy or programmatic interest, which may include more programs being sampled. This notice is specific to the data collection activities needed to recruit Head Start programs and centers into FACES 2014–2018. A future notice will provide information about data collection for the Core and Plus studies.

A total of 230 Head Start programs and 460 Head Start centers will be selected to participate in FACES 2014–2018. The Core Study will include a nationally representative sample of 180 programs, with up to 50 additional programs potentially selected for Plus studies. For the Core, the 60 programs participating in the Core child-level data collection will be contacted and recruited for the study in spring 2014. In fall 2014, the remaining 120 programs will be contacted. All 180 programs will be contacted a second time in fall 2016 to confirm their continued participation in the Core spring 2017 data collection. The 50 Plus study programs would be recruited at a similar time as the Core study programs (i.e., spring 2014 or fall 2014/2016) depending on the nature of the study being conducted.

The method of data collection for recruitment of all programs will include telephone conversations with program directors and on-site coordinators who serve as liaisons between the FACES study team and the Head Start centers. These calls will inform program staff about the purpose of the study and will gather lists of centers in each program in order to compile the center sampling frame.

The purpose of this data collection is to support the 2007 reauthorization of the Head Start program (Pub. L. 110–134), which calls for periodic assessments of Head Start's quality and effectiveness.

Respondents: Head Start Program Directors and Staff.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Number of responses per respondent	Average burden hour per response	Estimated total burden hours	Estimated annual burden hours
Telephone script for program directors	230	2	1	460	154
Telephone script for on-site coordinators	230	2	.75	345	115
Total				805	269

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer. Email address: *OPREinfocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Karl Koerper,

OPRE Reports Clearance Officer.

[FR Doc. 2013–29668 Filed 12–11–13; 8:45 am]

BILLING CODE 4184–22–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0889]

Guidance for Industry on New Animal Drugs and New Animal Drug Combination Products Administered in or on Medicated Feed or Drinking Water of Food-Producing Animals: Recommendations for Drug Sponsors for Voluntarily Aligning Product Use Conditions With Guidance for Industry #209; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry #213 entitled ''New Animal Drugs and New Animal Drug Combination Products Administered in or on Medicated Feed or Drinking Water of Food-Producing Animals: Recommendations for Drug Sponsors for Voluntarily Aligning Product Use Conditions With Guidance for Industry #209.'' The purpose of this document is to provide information to sponsors of certain antimicrobial new animal drug products who are interested in revising conditions of use for those products consistent with FDA's Guidance for Industry (GFI) #209, ''The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals,'' and to set timelines for stakeholders wishing to comply voluntarily with this guidance.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one selfaddressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: William T. Flynn, Center for Veterinary Medicine (HVF–1), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9084, email: *william.flynn@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of April 13, 2012 (77 FR 22327), FDA published the notice of availability for a draft guidance entitled ''New Animal Drugs and New Animal Drug Combination Products Administered in or on Medicated Feed or Drinking Water of Food-Producing Animals: Recommendations for Drug Sponsors for Voluntarily Aligning Product Use Conditions With GFI #209,'' giving interested persons until July 12, 2012, to comment on the draft guidance. FDA received numerous comments on the draft guidance and those comments were considered as the guidance was finalized. In addition, editorial changes were made to improve clarity. The guidance announced in this notice finalizes the draft guidance dated April 13, 2012.

The purpose of this guidance document is to provide information to sponsors of certain antimicrobial new animal drug products who are interested in revising conditions of use for those products consistent with FDA's Guidance for Industry (GFI) #209, ''The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals,'' and to set timelines for stakeholders wishing to comply voluntarily with this guidance. FDA intends to work with affected drug sponsors to help them to voluntarily implement the principles described above through modifications to the approved conditions of use of their new animal drug products. FDA believes a voluntary approach, conducted in a cooperative and timely manner, is the most effective approach to achieve the common goal of more judicious use of medically important antimicrobials in animal agriculture.

FDA recognizes that it is important to identify ways to assess the effect of GFI #209 and GFI #213 over time. FDA currently collects data on the sale and distribution of antimicrobial drugs intended for use in food-producing animals, as well as data on antimicrobial resistance among foodborne pathogens as part of the National Antimicrobial Resistance Monitoring System. FDA is currently working in collaboration with other agencies, including United States Department of Agriculture and the Centers for Disease Control, to explore approaches for enhancing current data collection efforts in order to measure the effectiveness of the strategy. FDA anticipates seeking additional public input as it develops these enhancements.

II. Significance of Guidance

This level 1 guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on the topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 514 have been approved under OMB control numbers 0910–0032 and 0910–0669.

IV. Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

V. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm* or *http://www.regulations.gov.*

Dated: December 9, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–29697 Filed 12–11–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1504]

Independent Assessment of the Process for the Review of Device Submissions; High Priority Recommendations

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is presenting Booz Allen Hamilton's high priority recommendations submitted as part of their independent assessment of the process for the review of medical device submissions. The assessment is part of the FDA performance commitments relating to the Medical Device User Fee Amendments of 2012 (MDUFA III), which reauthorized device user fees for fiscal years 2013 to 2017. The assessment is described in section V, ''Independent Assessment of Review Process Management'', of the commitment letter entitled ''MDUFA Performance Goals and Procedures'' [1] (MDUFA III Commitment Letter). The assessment is being conducted in two phases. The high priority recommendations are the first of a series of deliverables, as outlined in the contract statement of work,[2] to be published as part of Phase 1 of the assessment.

FOR FURTHER INFORMATION CONTACT: Amber Sligar, Office of Planning, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 3291, Silver Spring, MD 20993–0002, 301–796–9384, *Amber.Sligar@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On July 9, 2012, President Obama signed into law the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144) (FDASIA).[3] Title

[1] *www.fda.gov/downloads/MedicalDevices/NewsEvents/WorkshopsConferences/UCM295454.pdf.*

[2] *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/MDUFAIII/ucm314036.htm.*

[3] *http://www.gpo.gov/fdsys/pkg/PLAW–112publ144/pdf/PLAW–112publ144.pdf.*

II of FDASIA is MDUFA III, which gives FDA the authority to collect device user fees from industry for fiscal years 2013 to 2017. MDUFA III took effect on October 1, 2012, and will continue through September 30, 2017.

Device user fees were first established by Congress in 2002. Medical device companies pay fees to FDA when they register their establishment and list their devices with the Agency, whenever they submit an application or a notification to market a new medical device in the United States, and for certain other types of submissions. Under MDUFA III, FDA is authorized to collect user fees that will total approximately $595 million (plus adjustments for inflation) over 5 years. With this additional funding, FDA will be able to hire more than 200 full-time-equivalent workers over the course of MDUFA III. In exchange, FDA has committed to meet certain performance goals outlined in the MDUFA III Commitment Letter.[4]

II. Assessment of FDA's Process for the Review of Device Submissions

Section V of the MDUFA III Commitment Letter states that FDA and the device industry will participate in a comprehensive assessment of the process for the review of device applications. The assessment will include consultation with both FDA and industry. The assessment will be conducted in two phases by a private, independent consulting firm, under contract with FDA, that is capable of performing the technical analysis, management assessment, and program evaluation tasks required to address the assessment as described in the MDUFA III Commitment Letter.

FDA awarded the contract in June 2013 to the consulting firm Booz Allen Hamilton. Findings on high-priority recommendations (i.e., those likely to have a significant impact on review times) were scheduled to be published within 6 months of award and are included in the report available through the link near the end of this notice. Final comprehensive findings and recommendations are scheduled to be published within 1 year of contract award. FDA agreed to publish an implementation plan within 6 months of receipt of each set of recommendations. For Phase 2 of the independent assessment, the contractor will evaluate the implementation of recommendations and publish a written assessment no later than February 1, 2016.

[4] *www.fda.gov/downloads/MedicalDevices/NewsEvents/WorkshopsConferences/UCM295454.pdf.*

The assessment includes, but is not limited to, the following areas:

1. Identification of process improvements and best practices for conducting predictable, efficient, and consistent premarket reviews that meet regulatory review standards.

2. Analysis of elements of the review process (including the presubmission process, and investigational device exemption, premarket notification (510(k)), and premarket approval application reviews) that consume or save time to facilitate a more efficient process. This includes analysis of root causes for inefficiencies that may affect review performance and total time to decision. This will also include recommended actions to correct any failures to meet MDUFA goals. Analysis of the review process will include the impact of combination products, companion diagnostic products, and laboratory developed tests on the review process.

3. Assessment of FDA methods and controls for collecting and reporting information on premarket review process resource use and performance.

4. Assessment of effectiveness of FDA's Reviewer Training Program implementation.

5. Recommendations for ongoing periodic assessments and any additional, more detailed, or focused assessments.

FDA will incorporate findings and recommendations, as appropriate, into its management of the premarket review program. FDA will analyze the recommendations for improvement opportunities identified in the assessment, develop and implement a corrective action plan, and assure its effectiveness. FDA also will incorporate the results of the assessment into a Good Review Management Practices (GRMP) guidance document. FDA's implementation of the GRMP guidance will include initial and ongoing training of FDA staff, and periodic audits of compliance with the guidance.

The contractor's Phase 1 findings on high priority recommendations are available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/MDUFAIII/ucm314036.htm.*

Dated: December 6, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–29612 Filed 12–6–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center For Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Obesity, Insulin Action, and Metabolic Dysfunction.

Date: January 9, 2014.

Time: 9:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Reed A Graves, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6166, MSC 7892, Bethesda, MD 20892, (301) 402–6297, *gravesr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Immune and Radiotherapy.

Date: January 16, 2014.

Time: 9:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Lawrence Ka-Yun Ng, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6152, MSC 7804, Bethesda, MD 20892, 301–435–1719, *ngkl@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: *December 6, 2013.*

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–29613 Filed 12–11–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2013–0035; OMB No. 1660–0089]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (i.e., the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before January 13, 2014.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or email address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: FEMA Mitigation Success Story Database.

Type of Information Collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0089.

Form Titles and Numbers: FEMA Form 086–0–25, Mitigation Best Practice Submission Worksheet.

Abstract: FEMA uses the information provided through success stories to document and disseminate first-hand experiences of mitigation activities that result in benefits to individuals. By sharing information, communities, individuals, and the affected public can learn about available Federal programs to support the implementation of noteworthy local activities that lessen the chance of a catastrophic event causing damage or possibly loss of life.

Affected Public: Individuals or households; State, local or Tribal Government.

Estimated Number of Respondents: 50.

Estimated Total Annual Burden Hours: 88 hours.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $2,711.28. There are no annual costs to respondents' operations and maintenance costs for technical services. There is no annual start-up or capital costs. The cost to the Federal Government is $75,190.00.

Dated: December 4, 2013.

Charlene D. Myrthil,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2013–29655 Filed 12–11–13; 8:45 am]

BILLING CODE 9110–11–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0041; OMB No. 1660–0118]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (i.e., the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before January 13, 2014.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or email address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: Homeland Security Exercise and Evaluation Program (HSEEP) After Action Report (AAR) Improvement Plan (IP).

Type of Information Collection: Revision of a currently approved information collection.

Form Titles and Numbers: FEMA Form 091–0, Homeland Security Exercise and Evaluation Program (HSEEP) After Action Report (AAR) Improvement Plan (IP).

Abstract: The Homeland Security Exercise and Evaluation Program (HSEEP) After Action Report (AAR) Improvement Plan (IP) collection provides reporting on the results of preparedness exercises and provides assessments of the respondents' capabilities so that strengths and areas for improvement are identified, corrected, and shared as appropriate prior to a real incident. This information is also required to be submitted as part of certain FEMA grant programs.

Affected Public: State, Local or Tribal Government; Federal Government.

Estimated Number of Respondents: 175.

Estimated Total Annual Burden Hours: 511.

Estimated Cost: There are no recordkeeping, capital, start-up or maintenance costs associated with this information collection.

Dated: December 4, 2013.

Charlene D. Myrthil,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2013–29656 Filed 12–11–13; 8:45 am]

BILLING CODE 9111–46–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0036; OMB No. 1660–0126]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (i.e., the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before January 13, 2014.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or email address *FEMA-Information-Collections-Management@dhs.gov*.

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: FEMA Preparedness Grants: Emergency Management Performance Grant (EMPG).

Type of Information Collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0126.

Form Titles and Numbers: No forms.

Abstract: The Emergency Management Performance Grants (EMPG) Program assists State and local governments in enhancing and sustaining all-hazards emergency management capabilities. The EMPG Work Plan narrative must demonstrate how proposed projects address gaps, deficiencies, and capabilities in current programs and the ability to provide enhancements consistent with the purpose of the program and guidance provided by FEMA. FEMA uses the information to provide details, timelines, and milestones on proposed projects.

Affected Public: State, Local, or Tribal Government.

Estimated Number of Respondents: 58.

Estimated Total Annual Burden Hours: 174 hours.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $5,603.00. There are no annual costs to respondents operations and maintenance costs for technical services. There is no annual start-up or capital costs. The cost to the Federal Government is $362,093.40.

Dated: December 4, 2013.

Charlene D. Myrthil,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2013–29653 Filed 12–11–13; 8:45 am]

BILLING CODE 9111–19–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0037; OMB No. 1660–0023]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Effectiveness of a Community's Implementation of the NFIP Community Assistance Program CAC and CAV Reports

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (i.e., the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before January 13, 2014.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or email address *FEMA-Information-Collections-Management@dhs.gov*.

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: Effectiveness of a Community's Implementation of the NFIP Community Assistance Program CAC and CAV Reports.

OMB Number: 1660–0023.

Type of Information Collection: Revision of a currently approved information collection.

Form Titles and Numbers: FEMA Form 086–0–28(E), Community Visit Report; FEMA Form 086–0–29(E), Community Contact Report.

Abstract: Through the use of a Community Assistance Contact (CAC) or Community Assistance Visit (CAV), FEMA can make a comprehensive assessment of a community's floodplain management program. Through this assessment, FEMA can assist the community to understand the National Flood Insurance Program's (NFIP's) requirements, and implement effective flood loss reductions measures. Communities can achieve cost savings through flood mitigation actions by way of insurance premium discounts and reduced property damage.

Affected Public: State, local or Tribal Government.

Estimated Number of Respondents: 3,000.

Estimated Total Annual Burden Hours: 4,000 hours.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $141,560.00. There are no annual costs to respondents operations and maintenance costs for technical services. There is no annual start-up or capital costs. The cost to the Federal Government is $213,096.00.

Dated: December 4, 2013.

Charlene D. Myrthil,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2013–29652 Filed 12–11–13; 8:45 am]

BILLING CODE 9111–47–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2013–0038; OMB No. 1660–0030]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Request for the Site Inspection, Landowners Authorization/Ingress/Egress Agreement.

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (i.e., the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before January 13, 2014.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or email address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: Request for the Site Inspection, Landowners Authorization/Ingress/Egress Agreement.

Type of Information Collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0030.

Form Titles and Numbers: FEMA Form 010–0–09, Request for the Site Inspection; FEMA Form 010–0–10, Landowner's Authorization Ingress-Egress Agreement.

Abstract: FEMA's Individual and Households Program provides temporary housing to eligible survivors of federally declared disasters in the form of financial payments for rent assistance. When eligible survivors are unable to make use of rental assistance due to a lack of available housing resources, FEMA may provide direct assistance. Manufactured housing units are a form of direct assistance that FEMA may provide. This information is required to determine whether the infrastructure of a site identified by the survivor supports the installation of the unit. This collection also obtains permission for FEMA and its contractors to place the unit on the property. The property owner certifies that they will not obstruct access to the unit nor will they have a lien placed against the unit for their own debts, thus ensuring they will maintain the property so that FEMA can remove the unit when required.

Affected Public: Individuals or households.

Estimated Number of Respondents: 5,000.

Estimated Total Annual Burden Hours: 1,700 hours.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $47,600.00. There are no annual costs to respondents operations and maintenance costs for technical services. There is no annual start-up or capital costs. The cost to the Federal Government is $3,229,500.00.

Dated: December 4, 2013.

Charlene D. Myrthil,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2013–29654 Filed 12–11–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4149–DR; Docket ID FEMA–2013–0001]

Pennsylvania; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for Commonwealth of Pennsylvania (FEMA–4149–DR), dated October 1, 2013, and related determinations.

DATES: *Effective Date:* November 27, 2013.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Steven S. Ward, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Donald L. Keldsen as Federal Coordinating Officer for this disaster.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2013–29659 Filed 12–11–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Request for Information

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-day notice and request for comments; extension of an existing collection of information: 1651–0023.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning: Request for Information (CBP Form 28). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3507).

DATES: Written comments should be received on or before February 10, 2014, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3507). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Request for Information.

OMB Number: 1651–0023.

Form Number: CBP Form 28.

Abstract: Under 19 U.S.C. 1500 and 1401a, Customs and Border Protection (CBP) is responsible for appraising imported merchandise by ascertaining its value, classifying merchandise under the tariff schedule, and assessing a rate and amount of duty to be paid. On occasions when the invoice or other documentation does not provide sufficient information for appraisement or classification, the CBP Officer requests additional information through the use of CBP Form 28, ''Request for Information''. This form is completed by CBP personnel requesting additional information and the importers, or their agents, respond in the format of their choice. CBP Form 28 is provided for by 19 CFR 151.11. A copy of this form and instructions are available at *http://forms.cbp.gov/pdf/CBP_Form_28.pdf.*

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours or to CBP Form 28.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 60,000.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 60,000.

Dated: December 9, 2013.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2013–29713 Filed 12–11–13; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Importation Bond Structure

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-day notice and request for comments; extension of an existing collection of information: 1651–0050.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Importation Bond Structure. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3507).

DATES: Written comments should be received on or before February 10, 2014, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3507). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Importation Bond Structure.

OMB Number: 1651–0050.

Form Number: CBP Forms 301 and 5297.

Abstract: Bonds are used to assure that duties, taxes, charges, penalties, and reimbursable expenses owed to the Government are paid; to facilitate the movement of cargo and conveyances through CBP processing; and to provide legal recourse for the Government for noncompliance with laws and regulations. Each person who is required by law or regulation to post a bond in order to secure a Customs transaction must submit the bond on CBP Form 301 which is available at: *http://forms.cbp.gov/pdf/CBP_Form_301.pdf*.

Surety bonds are usually executed by an agent of the surety. The surety company grants authority to the agent via a Corporate Surety Power of Attorney, CBP Form 5297. This power is vested with CBP so that when a bond is filed, the validity of the authority of the agent executing the bond and the name of the surety can be verified to the surety's grant. CBP Form 5297 is available at: *http://forms.cbp.gov/pdf/CBP_Form_5297.pdf.* Bonds are required pursuant to 19 U.S.C. 1608, and 1623; 22 U.S.C. 463; 19 CFR Part 113.

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours or to CBP Forms 301 or 5297.

Type of Review: Extension (without change).

Affected Public: Businesses.

Form 301, Customs Bond

Estimated Number of Annual Respondents: 800,000.

Total Number of Estimated Annual Responses: 800,000.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 200,000.

Form 5297, Corporate Surety Power of Attorney

Estimated Number of Respondents: 500.

Total Number of Estimated Annual Responses: 500.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 125.

Dated: December 9, 2013.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2013–29712 Filed 12–11–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNML003100 L14300000.ES0000; NMNM 128496]

Notice of Realty Action: Recreation and Public Purposes Act Classification; Lease and Conveyance of Public Land, Doña Ana County, NM

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: The Bureau of Land Management (BLM) has examined approximately 346.59 acres of public land in Doña Ana County, New Mexico, and found them suitable for classification for lease and/or conveyance under the provisions of the Recreation and Public Purposes (R&PP) Act, as amended. The City of Las Cruces proposes to use the land for a public safety complex and recreation park center.

DATES: Interested parties may submit written comments regarding the proposed classification of the land or lease and/or conveyance of the land on or before January 27, 2014.

ADDRESSES: Written comments concerning this Notice should be addressed to: District Manager, BLM Las Cruces District Office, 1800 Marquess Street, Las Cruces, NM 88005.

FOR FURTHER INFORMATION CONTACT: Kendrah Penn, Realty Specialist, at the above address, by phone at 575–525–4382, or by email at *kpenn@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: In accordance with Section 7 of the Taylor Grazing Act (43 U.S.C. 315f), the following public land in Doña Ana County, New Mexico, has been examined and found suitable for classification for lease and/or conveyance to the City of Las Cruces under the provisions of the R&PP Act, as amended (43 U.S.C. 869 *et seq.*):

New Mexico Principal Meridian, New Mexico

T. 23 S., R. 2 E.,
Sec. 3, lots 1 and 2, SW¼NE¼, N½SE¼NE¼, SW¼SE¼NE¼, E½W½W½E½SE¼NW¼, E½W½E½SE¼NW¼, E½E½SE¼NW¼, E½W½E½NE¼SW¼, E½E½NE¼SW¼, E½W½E½SE¼SW¼, E½E½SE¼SW¼, W½NE¼SE¼, SE¼NE¼SE¼, W½SE¼, and SE¼SE¼.

The area described contains 346.59 acres. Any area described as a half (½) of a half (½) is based on the proper subdivision of section in accordance with the *Manual of Surveying Instructions.*

In accordance with the R&PP Act, the City of Las Cruces proposes to use the land for a fire station, police substation, trail network, and sports fields. Additional detailed information pertaining to this application, plan of development, and site plans are contained in case file NMNM 128496 located in the BLM Las Cruces District Office. The above-described land is not needed for any Federal purpose. The lease and/or conveyance of the land to the City of Las Cruces, are consistent with the BLM Mimbres Resource Management Plan, dated December 1993, and would be in the public interest. The City of Las Cruces has not applied for more than the 640-acre annual limitation for public purposes other than recreation use and has submitted a statement in compliance with the regulation at 43 CFR 2741.4(b).

The lease and/or conveyance, when issued, will be subject to the provisions of the R&PP Act and applicable regulations of the Secretary of the Interior and will contain the following reservations to the United States:

1. Provisions of the R&PP Act and to all applicable regulations of the Secretary of the Interior, including, but not limited to, the terms required by 43 CFR 2741.9.
2. A right-of-way for ditches and canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).
3. Lease and/or conveyance of the public land shall be subject to valid existing rights.
4. All minerals will be reserved to the United States, together with the right to prospect for, mine, and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe.
5. Any other reservations that the authorized officer determines appropriate to ensure public access and proper management of Federal land and interests therein.

Subject to limitations prescribed by law and regulations, prior to conveyance, a holder of any right-of-way within the lease area may be given the opportunity to amend the right-of-way for conversion to a new term, including perpetuity, if applicable.

Detailed information concerning this proposed project, including, but not limited to documentation relating to compliance with applicable environmental and cultural resource laws, is available for review at the BLM Las Cruces District at the address above.

Upon publication of this notice in the **Federal Register**, the land described will be segregated from appropriation under the public land laws, including the general mining laws, except for lease or conveyance under the R&PP Act, and leasing under the mineral leasing laws.

Classification Comments: Interested parties may submit comments involving the suitability of the land for the proposed facility. Comments on the classification are restricted to whether the land is physically suited for the proposal, where the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

Application Comments: Interested parties may submit comments regarding the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability of the land for R&PP use.

Any adverse comments will be reviewed by the BLM New Mexico State Director, who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, the classification of the land described in this notice will become effective on February 10, 2014. The land will not be available for lease and/or conveyance until after the classification becomes effective.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 CFR 2741.5.

Bill Childress,

District Manager, Las Cruces.

[FR Doc. 2013–29671 Filed 12–11–13; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWYD04000, L14300000, EU0000, WYW167726]

Notice of Realty Action; Notice of Segregation and Proposed (Non-Competitive) Direct Sale of Public Land, Sweetwater County, WY

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: The Bureau of Land Management (BLM) is considering a parcel of public land totaling 60 acres adjacent to the Jim Bridger Power Plant landfill and located approximately 30 miles east of Rock Springs, Wyoming in Sweetwater County for a direct sale to PacifiCorp under the provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, for not less than the appraised fair market value (FMV).

DATES: In order to ensure consideration in the environmental analysis for the proposed sale, comments must be received by the BLM by January 27, 2014.

ADDRESSES: Address all comments concerning this notice to Field Manager, BLM Rock Springs Field Office, 280 Highway 191 North, Rock Springs, WY 82901–3447. Comments may also be emailed to *BLM_WY_PacifiCorp_Landfill_Expansion@blm.gov*.

FOR FURTHER INFORMATION CONTACT: Carol Montgomery, Realty Specialist, at the above address, or phone number: 307–352–0344 for further information. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The following described public land is being considered for direct sale under the authority of Section 203 and 209 of the FLPMA, as amended (43 U.S.C. 1713 and 1719):

Sixth Principle Meridian

T. 21 N., R. 101 W.,
Sec. 24, NW¼SW¼ and W½NE¼SW¼.

The area described contains 60 acres in Sweetwater County, Wyoming, according to the official plat of the survey of the said land, on file with the BLM.

The proposed direct sale is in conformance with the BLM Green River Resource Management Plan (RMP) approved on August 8, 1997. The parcel is identified for disposal in the RMP Record of Decision, pages 171 and 172 and Map 6. The BLM is offering the parcel to PacifiCorp to expand the adjacent landfill. PacifiCorp's private lands surround three sides of the public lands. This parcel is not needed for any other Federal purpose and is difficult and uneconomical to manage. The regulations found at 43 CFR 2711.3–3(a) permit the BLM to make direct sales of public lands when a competitive sale is not appropriate and the public interest would be best served by a direct sale. The regulations at 43 CFR 2711.3–3(a)(3) permit direct sales if there is a need to recognize an authorized use such as an existing business which could suffer a substantial economic loss if the tract were purchased by other than the authorized user. Conveyance of the identified public land will be subject to valid existing rights and encumbrances of record, including but not limited to, rights-of-way for roads and public utilities. All minerals will be reserved to the United States in the conveyance. In addition to this Notice of Realty Action (NORA), the BLM will publish this notice once a week for 3 weeks in the Rocket Miner Newspaper.

Pursuant to the requirements of 43 CFR 2711.1–2(d), the lands identified above will be segregated from appropriation under the public land laws, including the mining laws, upon publication in the **Federal Register** of this notice. Upon publication of this NORA, and until completion of the sale, the BLM is no longer accepting land use applications affecting the identified public land, except applications for the amendment of previously filed right-of-way applications or existing authorizations to increase the term of the grants in accordance with 43 CFR 2807.15 and 2886.15. This segregation will terminate upon the issuance of a patent, publication in the **Federal Register** of a termination of the segregation, or December 14, 2015, whichever comes first unless extended by the BLM State Director in accordance with 43 CFR 2711.1–2(d) prior to the termination date.

The following terms and conditions would appear as reservations to the United States on the conveyance document for this parcel:

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945);

2. All minerals, together with the right to prospect for, mine, and remove such deposits from the same under applicable

law and such regulations as the Secretary of the Interior may prescribe.

3. Additional terms and conditions that the authorized officer deems appropriate, including an appropriate indemnification clause protecting the United States from claims arising out of the conveyee's use, occupancy, or occupation on the lands should the lands be conveyed out of Federal ownership.

The FMV for the sale parcel will be available for review 60 days prior to the sale date. An environmental assessment (EA) is being prepared for the proposed direct sale. When completed, the EA will be available for review at the address above.

For a period until January 27, 2014, interested parties and the general public may submit in writing any comments concerning the land being considered for sale, including notification of any encumbrances or other claims relating to the identified land, to the Field Manager, BLM Rock Springs Field Office, at the above address. In order to ensure consideration in the EA of the proposed sale, comments must be in writing and post marked or delivered within 45 days of the initial date of publication of this Notice.

Comments transmitted via email will also be accepted and should be sent to *BLM_WY_PacifiCorp_Landfill_Expansion@blm.gov*. Comments, including names and street addresses of respondents, will be available for public review at the BLM Rock Springs Field Office during regular business hours, except holidays. Individual respondents may request confidentiality. Before including your address, phone number, email address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so. The BLM will make available for public review, in their entirety, all comments submitted by businesses or organizations, including comments by individuals in their capacity as an official or representative of a business or organization.

(Authority: 43 CFR 2711.1–2 and 43 CFR 2720.1–1(b))

Donald A. Simpson,

State Director, Wyoming.

[FR Doc. 2013–29672 Filed 12–11–13; 8:45 am]

BILLING CODE 4310–22–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–909 (Second Review)]

Low Enriched Uranium From France

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty order on low enriched uranium from France would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[2]

Background

The Commission instituted this review on December 3, 2012 (77 FR 71626) and determined on March 8, 2013 that it would conduct a full review (78 FR 19311, March 29, 2013). Notice of the scheduling of the Commission's review and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on April 10, 2013 (78 FR 21416). The hearing was held in Washington, DC, on September 10, 2013, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission completed and filed its determination in this review on December 6, 2013. The views of the Commission are contained in USITC Publication 4436 (December 2013), entitled *Low Enriched Uranium from France: Investigation No. 731–TA–909 (Second Review).*

By order of the Commission.

Issued: December 6, 2013.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–29603 Filed 12–11–13; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

[2] Commissioner Kieff did not participate in this review. Commissioner Aranoff did not participate in the determination concerning this review. Commissioner Broadbent dissenting.

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–416; NRC–2011–0262]

License Renewal Application for Grand Gulf Nuclear Station, Unit 1

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft supplemental generic environmental impact statement; issuance, public meeting, and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment a draft, plant-specific, supplement 50 to the Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants, NUREG–1437, regarding the renewal of operating license NPF–29 for an additional 20 years of operation for Grand Gulf Nuclear Station, Unit 1 (GGNS). The GGNS is located in Claiborne County, Mississippi. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources. The NRC staff plans to hold two public meetings during the public comment period to present an overview of the draft plant-specific supplement to the GEIS and to accept public comments on the document.

DATES: Submit comments by February 11, 2014. Comments received after this date will be considered, if it is practical to do so, but the NRC staff is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2011–0262. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: 3WFN–06–44M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: David Drucker, Office of Nuclear Reactor Regulation, telephone: 301–415–6223 or email to *David.Drucker@nrc.gov;* U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2011–0262 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this document by any of the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2011–0262.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. The draft plant-specific supplement 50 to the GEIS for License Renewal of Nuclear Plants, NUREG–1437, is available in ADAMS under Accession No. ML13328A002.

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2011–0262 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov,* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Discussion

The NRC is issuing for public comment a draft plant-specific supplement 50 to the GEIS for License Renewal of Nuclear Plants, NUREG–1437, regarding the renewal of operating license NPF–29 for an additional 20 years of operation for GGNS. Supplement 50 to the GEIS includes the preliminary analysis that evaluates the environmental impacts of the proposed action and alternatives to the proposed action. The NRC's preliminary recommendation is that the adverse environmental impacts of license renewal for GGNS are not great enough to deny the option of license renewal for energy planning decision makers.

III. Public Meetings

The NRC staff will hold public meetings prior to the close of the public comment period to present an overview of the draft plant-specific supplement to the GEIS and to accept public comment on the document. Two meetings will be held at the Port Gibson City Hall, 1005 College Street, Port Gibson, Mississippi 39150 on Wednesday, January 29, 2014. The first session will convene at 2:00 p.m. and will continue until 3:30 p.m., as necessary. The second session will convene at 7:00 p.m. and will continue until 8:30 p.m., as necessary. The meetings will be transcribed and will include: (1) A presentation of the contents of the draft plant-specific supplement to the GEIS, and (2) the opportunity for interested government agencies, organizations, and individuals to provide comments on the draft report. Additionally, the NRC staff will host informal discussions one hour prior to the start of each session at the same location. No comments on the draft supplement to the GEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meeting or in writing. Persons may pre-register to attend or present oral comments at the meeting by contacting Mr. David Drucker, the NRC Environmental Project Manager, at 1–800–368–5642, extension 6223, or by email at *david.drucker@nrc.gov* no later than Wednesday, January 22, 2014. Members of the public may also register to provide oral comments within 15 minutes of the start of each session. Individual oral comments may be limited by the time available, depending on the number of persons who register. If special equipment or accommodations are needed to attend or present information at the public meeting, the need should be brought to Mr. Druckers' attention no later than Wednesday, January 22, 2014, to provide the NRC staff adequate notice to determine whether the request can be accommodated.

Dated at Rockville, Maryland, this 6th day of December, 2013.

For The Nuclear Regulatory Commission.

Brian D. Wittick,

Chief, Projects Branch 2, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2013–29676 Filed 12–11–13; 8:45 am]

BILLING CODE 7590–01–P

PEACE CORPS

Information Collection Request; Submission for OMB Review

AGENCY: Peace Corps.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Peace Corps will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

DATES: Submit comments on or before February 10, 2014.

ADDRESSES: Comments should be addressed to Denora Miller, FOIA/Privacy Act Officer, Peace Corps, 1111 20th Street NW., Washington, DC 20526. Denora Miller can be contacted by telephone at 202–692–1236 or email at *pcfr@peacecorps.gov.* Email comments must be made in text and not in attachments.

FOR FURTHER INFORMATION CONTACT: Denora Miller at Peace Corps address above.

SUPPLEMENTARY INFORMATION: The information collected by the Volunteer Application is used by the Peace Corps to collect essential information from individuals, including technical and language skills, and availability for Peace Corps service. The Peace Corps will be changing its application process to better match applicants to programs based on their skills and interests. Due to this change in the way applicants are processed and an overall agency effort to reduce the burden on applicants by only asking the most essential questions, the agency is developing a new application.

Title: Peace Corps Volunteer Application.

OMB Control Number: 0420-pending.

Type of Review: New.

Affected Public: General public.

Respondents' Obligation To Reply: Voluntary.

Burden to the Public

a. *Estimated number of respondents:* 20,000.

b. *Estimated average burden per response:* 1 hour.

c. *Frequency of response:* one time.

d. *Annual reporting burden:* 20,000.

e. *Number of applications received electronically (99%):* 19,800.

f. *Number of applications received in hard copy (1%):* 200.

General Description of Collection: The Volunteer Application is used by Peace Corps in its assessment of an individual's qualifications to serve as a Peace Corps Volunteer. It is the document of record for an individual's decision to apply for Peace Corps service.

Request for Comment: Peace Corps invites comments on whether the proposed collections of information are necessary for proper performance of the functions of the Peace Corps, including whether the information will have practical use; the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the information to be collected; and, ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

This notice issued in Washington, DC, on December 6, 2013.

Dated: December 12, 2013.

Denora Miller,

FOIA/Privacy Act Officer, Management.

[FR Doc. 2013–29661 Filed 12–11–13; 8:45 am]

BILLING CODE 6051–01–P

OFFICE OF PERSONNEL MANAGEMENT

Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges; Announcement

AGENCY: Office of Personnel Management (OPM).

ACTION: Notice of effective date.

SUMMARY: This document announces the effective date of a regulatory provision published in the **Federal Register** by OPM on March 11, 2013 (78 FR 15559), entitled ''Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges.''

DATES: The effective date of OPM's regulatory provision relating to external review (45 CFR 800.503) is December 13, 2013.

FOR FURTHER INFORMATION CONTACT: Padma Shah by telephone at (202) 606–2128, by FAX at (202) 606–0033, or by email at *mspp@opm.gov*.

SUPPLEMENTARY INFORMATION: In the final rule published on March 11, 2013, OPM provided notice that the regulatory provision relating to external review (45 CFR 800.503) will take effect on the effective date of a technical amendment to regulations implementing section 2719 of the Public Health Service (PHS) Act, which apply to all non-grandfathered group health plans and health insurance issuers, including plans in the Multi-State Plan Program. On November 13, 2013, the Departments of Treasury, Labor, and Health and Human Services (''the Departments'') jointly published ''Final Rules under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008; Technical Amendment to External Review for Multi-State Plan Program'' (78 FR 68240). This final rule retains provisions the Departments proposed on March 21, 2013 (78 FR 17313), implementing a technical amendment to regulations for section 2719 of the PHS Act. This final rule specifies that Multi-State Plan coverage will be subject to standards established for the Federal external review process under section 2719(b)(2) of the PHS Act and paragraph (d) of the internal claims and appeals and external review regulations. Additionally, the Departments' final rule corrects a typographical error in the March 21, 2013 proposed rule. The effective date of the Departments' technical amendment is December 13, 2013, and accordingly, this document advises the public that the effective date of OPM's regulatory provision relating to external review (45 CFR 800.503) is also December 13, 2013.

U.S. Office of Personnel Management.

Katherine Archuleta,

Director.

[FR Doc. 2013–29702 Filed 12–11–13; 8:45 am]

BILLING CODE 6325–64–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–30821; File No. 812–14158]

Minnesota Life Insurance Company, et al.; Notice of Application

December 6, 2013.

AGENCY: The Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an order pursuant to Section 6(c) of the Investment Company Act of 1940, as amended (the ''1940 Act'' or ''Act''), granting exemptions from the provisions of Sections 2(a)(32) and 27(i)(2)(A) of the Act and rule 22c–1 under the Act.

APPLICANTS: Minnesota Life Insurance Company (''Minnesota Life'' or ''Insurance Company''), Variable Annuity Account (''Separate Account''), and Securian Financial Services, Inc. (''SFS'') (collectively, ''Applicants'').

SUMMARY: *Summary of Application:* Applicants seek an order amending an existing order pursuant to Section 6(c) of the 1940 Act, exempting them from the provisions of Sections 2(a)(32) and 27(i)(2)(A) of the 1940 Act and rule 22c-1 under the Act to the extent necessary to permit Applicants, under specified circumstances, to recapture certain bonuses (''Credit Enhancements'') applied to cumulative net purchase payments under certain deferred variable annuity contracts issued by the Insurance Company.

DATES: *Filing Date:* The application was filed on May 23, 2013, and an amended and restated application was filed on August 9, 2013.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving the Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 27, 2013, and should be accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

ADDRESSES: Secretary, SEC, 100 F Street NE., Washington, D.C. 20549–1090. Applicants, c/o Daniel P. Preiner, Counsel, Minnesota Life Insurance Company, 400 Robert Street North, St. Paul, Minnesota 55101.

FOR FURTHER INFORMATION CONTACT: Alberto H. Zapata, Senior Counsel, or Joyce M. Pickholz, Branch Chief, Insured Investments Office, Division of Investment Management, at (202) 551–6795.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm*, or by calling (202) 551–8090.

Applicants' Representations

1. Applicants seek the exemptions needed to recapture Credit Enhancements applied to cumulative net purchase payments that reach certain aggregate amounts in accordance with the formula described below made under: (i) New series (*e.g.,* B Series and L Series) of new deferred variable annuity contracts, including data pages, riders and endorsements as described below (the ''New Contracts'') and (ii) any deferred variable annuity contracts, including data pages, riders and endorsements, substantially similar in all material respects to the New Contracts that Minnesota Life may issue in the future (''Future Contracts'') (New Contracts and Future Contracts referred to collectively as the ''Contracts''). Applicants request that the relief under the order extend to any other separate accounts of Minnesota Life and their successors in interest that support the Contracts (''Future Accounts'') and any Financial Industry Regulatory Authority (''FINRA'') member broker-dealers controlling, controlled by, or under common control with any Applicant, whether existing or created in the future, that in the future, may act as principal underwriter for the Contracts (''Future Underwriters'').

2. In 2007 and 2008, the Commission issued orders granting exemptions that permit, under certain circumstances, the recapture of certain Credit Enhancements (collectively, the ''Existing Orders'').[1] Applicants wish to leave the Existing Orders intact, thus allowing them to continue to recapture Credit Enhancements under the contracts described in those orders (collectively, the ''Prior Contracts'').

3. The Existing Orders encompassed relief for future contracts substantially similar in all material respects to the Prior Contracts. Applicants state that the New Contracts differ from the Prior Contracts in the following respects: (1) The contract charges are slightly higher in some series and slightly lower in other series in the New Contracts; (2) the schedule of deferred sales charge is shorter in the L Series of the New Contracts; (3) the New Contracts offer different optional death benefit riders; (4) the New Contracts offer different optional guaranteed lifetime withdrawal benefit riders; and (5) the New Contracts do not offer the same fixed-interest allocation options. Although Credit Enhancement and recapture in the New Contracts will be administered in a manner that is substantially similar in all material respects to that of the Prior Contracts contemplated by the 2008 Order.

4. Minnesota Life is a stock life insurance company organized under the laws of Minnesota. Minnesota Life is authorized to sell insurance and annuities in all states (except New York), and the District of Columbia. Minnesota Life is the depositor and sponsor for the Separate Account, as those terms have been interpreted by the Commission with respect to variable annuity separate accounts. Minnesota Life may establish one or more additional Future Accounts for which it will serve as depositor.

5. The Separate Account is a segregated investment account under Minnesota law. The Separate Account is a ''separate account'' as defined by Section 2(a)(37) of the 1940 Act and is registered with the Commission as a unit investment trust (File No. 811–4294). A registration statement for interests in the Separate Account offered through the New Contracts has been filed with the Commission under the Securities Act of 1933, as amended, on Form N–4, File No. 333–189593.

6. The Separate Account is divided into a number of sub-accounts. Each sub-account invests exclusively in shares representing an interest in a separate corresponding investment portfolio of one of several series-type, open-end management investment companies. The assets of the Separate Account support one or more varieties of variable annuity contracts, including the Prior Contracts and the New Contracts, among others. Minnesota Life may issue Future Contracts through the Separate Account. Minnesota Life also may issue Contracts through Future Accounts.

7. Securian Financial Services, Inc. (''SFS'') is registered as a broker-dealer under the Securities Exchange Act of 1934 and is a member of FINRA. SFS serves as the principal underwriter of the Separate Account and may act as principal underwriter for Future Accounts for Minnesota Life and distributor for Future Contracts. Future Underwriters also may act as principal underwriter for Future Accounts and as distributor for any of the Contracts.

8. The New Contracts are deferred combination variable and fixed annuity contracts that Minnesota Life may issue to individuals on a ''non-qualified'' basis or in connection with certain types of retirement plans that receive favorable federal income tax treatment under the Internal Revenue Code of 1986, as amended. The New Contracts also make available a number of sub-accounts of the Separate Account to which a contract owner may allocate net purchase payments and associated Credit Enhancement(s), as described below.

9. A contract owner's initial purchase payment must be at least $10,000 (unless a lower qualified plan limitation applies). Thereafter, a contract owner may choose the amount and frequency of purchase payments, except that the minimum subsequent purchase payment is $500 ($100 for automatic payment plans). A contract owner may make transfers of contract value among and between the sub-account options at any time. Applicants have reserved the right to impose a $10 charge for each transfer when transfer requests exceed 12 in a single contract year, but are not currently imposing the charge.

10. The New Contracts offer a contract owner a variety of annuity payment options. The contract owner may annuitize at any time. If a deferred sales charge (''DSC'') would otherwise apply to New Contract withdrawals at the time of annuitization, the DSC will be waived for amounts applied to provide annuity payments.

11. The New Contracts provide for an annual administrative charge of $50 that Minnesota Life deducts from the New Contract's accumulation value on each contract anniversary and upon a full surrender of a New Contract if the greater of: (a) Contract value or (b) purchase payments less withdrawals, is less than $50,000. For the B Series of the New Contracts, a daily mortality and expense risk charge for the base New

[1] *See* Investment Company Act Release Nos. 27960 (Aug. 30, 2007) (notice) and 27979 (Sept. 25, 2007) (order); Investment Company Act Release Nos. 28321 (Jun. 26, 2008) (notice) and 28334 (Jul. 22, 2008) (order) (the ''2008 Order'').

Contract is deducted from the assets of the Separate Account at an annual rate equal to 1.15% of average account value, which is lower than the Prior Contracts contemplated by the 2008 Order. For the L Series of the New Contracts, a daily mortality and expense risk charge for the base New Contract is deducted from the assets of the Separate Account at an annual rate equal to 1.55% of average account value, which is higher than the Prior Contracts contemplated by the 2008 Order. For each series of the New Contracts, a daily administrative charge for the base New Contract is deducted from the assets of the Separate Account at an annual rate equal to 0.15% of average account value. The New Contracts have a DSC which is applicable on surrender and withdrawal of accumulation values. Credit Enhancements are not recaptured upon surrender or withdrawal. A charge may also be assessed depending on the type of optional benefit elected, if any.

12. The New Contracts offer a standard DSC schedule as follows:

Contract years since payment	0–1 (percent)	1–2 (percent)	2–3 (percent)	3–4 (percent)	4–5 (percent)	5–6 (percent)	6–7 (percent)	7–8 (percent)	8+
B Series Deferred Sales Charge	8.0	8.0	7.0	6.0	6.0	5.0	4.0	3.0	0
L Series Deferred Sales Charge	8.0	8.0	7.0	6.0	0	0	0	0	0

The DSC does not apply in any circumstances under which Credit Enhancements will be recaptured.

13. Subject to state availability, a contract owner may elect to purchase an optional living benefit rider. There are currently eight different Guaranteed Lifetime Withdrawal Benefit optional riders available (the ''GLWB Riders''), however, a contract owner may only elect a single living benefit on a New Contract. In the future, Minnesota Life may offer other living benefit riders as options under the Contracts.

14. Minnesota Life will deduct a maximum annual charge ranging from 0.25% to 2.25% (current charges range from 0.45% to 1.50%) of the greater of the contract value or benefit base (as described in the applicable GLWB Rider) depending on which GLWB Rider is elected. One quarter of the GLWB Rider charge will be taken three months after the GLWB Rider effective date and at the end of every three months thereafter. The charge does not apply after annuitization.

15. If a contract owner dies before the annuity start date, the New Contract provides for a death benefit payable to a beneficiary computed as described in the Application. In the future, Minnesota Life may offer other optional death benefit riders as options under the Contracts.

16. For the Highest Anniversary Value II Death Benefit, the Premier II Death Benefit, and the MyPath Highest Anniversary Death Benefit, Minnesota Life will deduct a maximum annual charge ranging from 0.30% to 1.00% of the death benefit amount, depending on which optional death benefit option is elected, if any. For the Estate Enhancement Benefit II, Minnesota Life will deduct a daily charge from the assets of the Separate Account at a maximum annual charge ranging from 0.25% to 0.40% of average account value.

17. The Contract provides three standard annuity options: a life annuity, a life annuity with a period certain, or a joint and last survivor annuity. Minnesota Life may make other options available on request.

18. Minnesota Life will credit the contract value allocated to the sub-accounts and the fixed-interest accounts with a Credit Enhancement when total cumulative net purchase payments reach the aggregate levels set forth in the following table:

Cumulative net purchase payments	Credit enhancement percentage
$250,000–$499,999.99	0.25%
$500,000–$749,999.99	0.50%
$750,000–$999,999.99	0.75%
$1,000,000 or more	1.00%

19. The term ''cumulative net purchase payments'' means the total of all purchase payments applied to the contract less any amounts previously withdrawn from contract value. Similar to the Prior Contracts contemplated by the 2008 Order, the amount of the Credit Enhancement to be credited will be calculated as follows: (a) Cumulative net purchase payments; multiplied by (b) the applicable Credit Enhancement percentage from the table above; minus (c) any Credit Enhancements previously applied to contract value.

20. Minnesota Life will allocate the Credit Enhancement for the applicable purchase payment among the sub-accounts and fixed interest accounts the contract owner selects in accordance with a contract owner's current purchase payment allocation instructions. As disclosed in the prospectus for the New Contracts, Minnesota Life reserves the right to increase or decrease the amount of the Credit Enhancement or discontinue the Credit Enhancement in the future. In such case, Minnesota Life would seek any additional exemptive relief to the extent required.

21. Minnesota Life intends to recapture or retain the Credit Enhancements only in the following circumstances. First, Minnesota Life recaptures or retains 100% of the Credit Enhancements in the event that the contract owner exercises his or her cancellation right during the ''free look'' period. Second, Minnesota Life recaptures all of the Credit Enhancements added to the Contract within 12 months prior to the date any amounts are paid out as a death benefit. Any Credit Enhancement added to the Contract more than 12 months prior to the date any amount is paid out as a death benefit would not be recaptured. Third, Minnesota Life will recapture all of the Credit Enhancements added to the Contract within 12 months prior to the annuitization date of the Contract. Any Credit Enhancement added to the Contract more than 12 months prior to the date of annuitization would not be recaptured. (If only a partial annuitization were elected, a *pro rata* portion of the Credit Enhancements added to the Contract within 12 months of the annuitization date would be recaptured.)

22. Investment gains attributable to the Credit Enhancement will not be recaptured. Since Minnesota Life does not recapture the investment gain/loss attributable to the Credit Enhancement, only the dollar amount of the Credit Enhancement added to the Contract is recaptured in the circumstances described in the application.

23. Finally, because it is not administratively feasible to track the Credit Enhancements in the Separate Account which may still be subject to recapture, Minnesota Life deducts the daily mortality and expense risk charge from the entire net asset value of the Separate Account. As a result, the daily mortality and expense risk charge, and any optional benefit charges paid by any

contract owner may be greater than that which he or she would pay without the Credit Enhancement.

Applicants' Legal Analysis

1. Applicants request that the Commission, pursuant to Section 6(c) of the 1940 Act, grant the exemptions set forth below to permit Applicants to recapture Credit Enhancements previously applied to purchase payments under the New Contracts: (1) In the event a contract owner exercises his or her right to cancellation/''free look'' under the New Contract; (2) if the Credit Enhancements were added to the Contract within 12 months prior to the date any amounts are paid out as a death benefit; and (3) if the Credit Enhancements were added to the Contract within 12 months prior to the date of annuitization or partial annuitization of the Contract.

2. Section 6(c) of the 1940 Act authorizes the Commission to exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from the provisions of the 1940 Act and the rules promulgated under the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

3. Appellants submit that the Credit Enhancement recapture is not a sales load. Rather, it is a recapture of a Credit Enhancement previously applied to a contract owner's purchase payments. Minnesota Life provides the Credit Enhancement from its general account on a guaranteed basis. The Contracts are designed to be long-term investment vehicles. If a contract owner withdraws his or her money during the free look period, if a death benefit is owed shortly after Credit Enhancements are applied, or if the Contract is annuitized before this anticipated period, Minnesota Life must recapture the Credit Enhancement subject to recapture in order to avoid a loss.

4. Applicants submit that the proposed recapture of the Credit Enhancement would not violate Section 2(a)(32) or 27(i)(2)(A) of the 1940 Act or rule 22c–1 under the Act. Minnesota Life would grant Credit Enhancements out of its general account assets. Applicants submit if Minnesota Life recaptures any Credit Enhancements or part of a Credit Enhancement in the circumstances described above, it would merely be retrieving its own assets.

5. Applicants further submit that the operation of the proposed Credit Enhancements would not violate Section 2(a)(32) or 27(i)(2)(A) of the 1940 Act because the recapture of Credit Enhancements would not, at any time, deprive a contract owner of his or her proportionate share of the current net assets of the Separate Account.

6. Applicant's assert that rule 22c–1 was intended to eliminate or reduce, as far as was reasonably practicable: (1) The dilution of the value of outstanding redeemable securities of registered investment companies through their sale at a price below net asset value or their redemption at a price above net asset value; or (2) other unfair results, including speculative trading practices. Applicants submit that the industry and regulatory concerns prompting the adoption of rule 22c–1 were primarily the result of backward pricing, the practice of basing the price of a mutual fund share on the net asset value per share determined as of the close of the market on the previous day. Applicants submit that the Credit Enhancements do not give rise to either of the two concerns that rule 22c–1 was designed to address. First, Applicants contend that the proposed Credit Enhancements pose no such threat of dilution. A contract owner's interest in his or her contract value or in the Separate Account would always be offered at a price based on net asset value next calculated after receipt of the request. Second, Applicants submit that speculative trading practices calculated to take advantage of backward pricing will not occur as a result of Minnesota Life's recapture of the Credit Enhancement. Variable annuities are designed for long-term investment, and by their nature, do not lend themselves to the kind of speculative short-term trading that rule 22c–1 was designed to prevent. More importantly, the Credit Enhancement recapture simply does not create the opportunity for speculative trading.

7. Applicants assert that the Credit Enhancement is generally beneficial to a contract owner. The recapture tempers this benefit somewhat, but unless: (1) The contract owner exercises his or her right to cancel the contract during the ''free look'' period, or (2) Minnesota Life applies Credit Enhancements and pays a death benefit during the same 12-month period, or (3) Minnesota Life applies Credit Enhancements and a contract owner annuitizes during the same 12-month period, the contract owner retains the ability to avoid the Credit Enhancement recapture. Applicants submit that as any earnings on Credit Enhancements applied would not be subject to recapture and thus would be immediately available to a contract owner. Applicants submit that the Credit Enhancement recapture does not diminish the overall value of the Credit Enhancement.

8. Applicants assert that recapture provision is necessary for Minnesota Life to offer the Credit Enhancement and prevent anti-selection—the risk that a contract owner would make significant purchase payments into the Contract solely to receive a quick profit from the Credit Enhancements and then withdraw his or her money. Applicants submit it would be unfair to Minnesota Life to permit a contract owner to keep his or her Credit Enhancement upon his or her exercise of the Contract's ''free look'' provision. Applicants submit it would also be unfair to Minnesota Life to permit a contract owner to keep his or her Credit Enhancements paid shortly before death benefits are paid or the contract is annuitized. Applicants further submit that because no additional DSC applies upon payment of a death benefit, a death shortly after the award of Credit Enhancements would afford a contract owner or a beneficiary a similar profit at Minnesota Life's expense. Finally, because no additional DSC applies on annuitization, if a contract owner annuitizes his or her contract shortly after the award of the Credit Enhancement, such event would afford a contract owner a similar profit at Minnesota Life's expense.

9. Applicants state that the Commission's authority under Section 6(c) of the 1940 Act to grant exemptions from various provisions of the 1940 Act and rules under that Act is broad enough to permit orders of exemption that cover classes of unidentified persons. Applicants request an order of the Commission that would exempt them, Minnesota Life's successors in interest, Future Accounts and Future Underwriters from the provisions of Sections 2(a)(32) and 27(i)(2)(A) of the 1940 Act and rule 22c–1 under the Act with respect to the Contracts. Applicants submit that the exemption of these classes of persons is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act because all of the potential members of the class could obtain the foregoing exemptions for themselves on the same basis as Applicants, but only at a cost to each of them that is not justified by any public policy purpose. As discussed in the application, the requested exemptions would only extend to persons that in all material respects are the same as Applicants.

10. Applicants represent that any Future Contracts will be substantially

similar in all material respects to the New Contracts, but particularly with respect to the Credit Enhancements and recapture of Credit Enhancements and that each factual statement and representation about the Credit Enhancement feature will be equally true of any Future Contracts. Applicants also represent that each material representation made by them about the Separate Account and SFS will be equally true of Future Accounts and Future Underwriters, to the extent that such representations relate to the issues discussed in this Application. In particular, each Future Underwriter will be registered as a broker-dealer under the Securities Exchange Act of 1934 and be a member of FINRA.

11. Based upon the foregoing, Applicants submit that recapture of the proposed Credit Enhancement involves none of the abuses to which provisions of the 1940 Act and rules thereunder are directed. The contract owner will always retain the investment experience attributable to the Credit Enhancement and will retain the principal amount in all cases except under the circumstances described in the Application. Further, Applicants assert that Minnesota Life should be able to recapture such Credit Enhancement to limit potential losses associated with such Credit Enhancements.

Conclusions

For the reasons set forth in the Application, the Applicants assert that the provisions for recapture of Credit Enhancements under the Contracts do not violate Section 2(a)(32) and 27(i)(2)(A) of the Act and rule 22c–1 under the Act and that the requested relief is consistent with the standards set forth in Section 6(c) of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Elizabeth M. Murphy,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71024; File No. SR–BYX–2013–039]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing of a Proposed Rule Change in Connection With the Proposed Business Combination Involving BATS Global Markets, Inc. and Direct Edge Holdings LLC

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 25, 2013, BATS Y-Exchange, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposed rule change (the ''Proposed Rule Change'') in connection with the proposed business combination (the ''Combination''), as described in more detail below, involving its parent company, BATS Global Markets, Inc. and Direct Edge Holdings LLC (''DE Holdings''), the indirect parent company of EDGX Exchange, Inc. (''EDGX'') and EDGA Exchange, Inc. (''EDGA''), each a national securities exchange registered with the Commission.

Upon completion of the Combination (the ''Closing''), BATS Global Markets, Inc. and DE Holdings will each become intermediate holding companies, held under a single new holding company. The new holding company, currently named ''BATS Global Markets Holdings, Inc.,'' will at that time change its name to ''BATS Global Markets, Inc.'' In addition, the current parent company of the Exchange, BATS Global Markets, Inc., will at that time change its name to ''BATS Global Markets Holdings, Inc.''

For ease of reference, this Proposed Rule Change will refer to the current parent company of the Exchange as ''Current BGM'' when referring to the entity prior to the Closing, and as ''BGM Holdings'' when referring to that entity after the Closing. The entity that will become the new top-level holding company that will, after Closing, own BGM Holdings and DE Holdings, will be referred to as ''New BGM.''

To effectuate the Combination, the Exchange seeks to obtain the Commission's approval of (i) resolutions of Current BGM's board of directors (the ''Resolutions'') making certain determinations regarding New BGM and the impact of the Combination on the Exchange; (ii) the proposed Amended and Restated Certificate of Incorporation of New BGM (the ''New BGM Charter''); (iii) the proposed Amended and Restated Bylaws of New BGM (the ''New BGM Bylaws''); (iv) the proposed amendments to Current BGM's Second Amended and Restated Certificate of Incorporation (the ''Current BGM Charter,'' and after such amendments, the ''BGM Holdings Charter''); (v) the proposed amendments to the Amended and Restated Bylaws of Current BGM (the ''Current BGM Bylaws,'' and after such amendments, the ''BGM Holdings Bylaws''); (vi) the proposed amendments to the By-Laws of the Exchange (the ''Exchange Bylaws''); (vii) the proposed amendments to Exchange Rule 2.3 to reflect the affiliation between the Exchange and two additional registered national securities exchanges; (viii) the proposed amendments to Exchange Rule 2.12 to reflect the affiliation between the Exchange and the routing broker for EDGA and EDGX; and (ix) the indirect acquisition by an affiliate of the Exchange of a Member[3] of the Exchange and the resulting affiliation between the Exchange and the Member of the Exchange, as required under Exchange Rule 2.10.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' is defined in Exchange Rule 1.5(n) as any registered broker or dealer that has been admitted to membership in the Exchange.

the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange submits this Proposed Rule Change to seek the Commission's approval of various changes to the organizational and governance documents of the Exchange and the Exchange's current and proposed future parent companies, changes to Exchange Rules,[4] and related actions that are necessary in connection with the Closing of the Combination, as described below.

Other than as described herein and set forth in the attached Exhibits 5A through 5H, the Exchange will continue to conduct its regulated activities (including operating and regulating its market and Members) in the manner currently conducted, and will not make any changes to its regulated activities in connection with the Combination. Except as set forth in this Proposed Rule Change, the Exchange is not proposing any amendments to its trading and regulatory rules at this time. If the Exchange determines to make any such changes, it will seek the approval of the Commission to the extent required by the Act, and the Commission's rules thereunder, and the Rules of the Exchange.

1. Current Corporate Structures

The Exchange and BATS Exchange, Inc. (''BZX'' and together with the Exchange, the ''BATS Exchanges''), are each Delaware corporations that are national securities exchanges registered with the Commission pursuant to Section 6(a) of the Act.[5] Each BATS Exchange is a direct, wholly owned subsidiary of Current BGM, a Delaware corporation. Current BGM also owns 100 percent of the equity interest in BATS Trading, Inc., a Delaware corporation (''BATS Trading'') that is a broker-dealer registered with the Commission that provides routing services outbound from and, in certain instances inbound to, each BATS Exchange. In contemplation of the Combination, several new entities have been formed: New BGM, a Delaware corporation, is currently a wholly owned subsidiary of Current BGM, and is currently a shell company with no material assets or operations. New BGM, in turn, owns 100 percent of the equity interest in each of Blue Merger Sub Inc., a Delaware corporation (''Blue Merger Sub''), and Delta Merger Sub LLC, a Delaware limited liability company (''Delta Merger Sub''). Each of Blue Merger Sub and Delta Merger Sub are currently shell companies with no material assets or operations.

Current BGM is itself beneficially owned primarily by a consortium of several unaffiliated firms, including Members or affiliates of Members of the Exchange. No firm beneficially owns 20 percent or greater of Current BGM, and the only firms beneficially owning ten percent or greater of Current BGM are (i) GETCO Investments, LLC, an affiliate of KCG Holdings, Inc., (ii) BGM Holding, L.P., a holding company itself owned by entities affiliated with the Spectrum Equity Investors and TA Associates Management private investment funds, and (iii) Strategic Investments I, Inc., an affiliate of Morgan Stanley.[6] Seven other firms each beneficially own five percent or greater but less than ten percent of Current BGM, while seven other firms as well as various individuals each beneficially own less than five percent of Current BGM.

DE Holdings, a Delaware limited liability company, owns 100 percent of the equity interest in Direct Edge, Inc., a Delaware corporation (''DEI''). DEI, in turn, owns 100 percent of the equity interest in two registered national securities exchanges, EDGX and EDGA, each a Delaware corporation (together, the ''DE Exchanges''). In addition, DE Holdings owns 100 percent of the equity interest in Direct Edge ECN LLC d/b/a DE Route, a Delaware limited liability company and the routing broker-dealer for the DE Exchanges (''DE Route'').

As a limited liability company, ownership in DE Holdings is represented by units held by ''LLC Members.'' Certain of the DE Holdings LLC Members are Members or affiliates of Members of the Exchange. The Exchange understands that International Securities Exchange Holdings, Inc. (''ISE Holdings'') is the only LLC Member of DE Holdings to beneficially own greater than 20 percent of the equity interest in DE Holdings. Other than ISE Holdings, the only firms beneficially owning ten percent or greater of DE Holdings (but in each case less than 20 percent) are Citadel Securities LLC, The Goldman Sachs Group, Inc., and an affiliate of KCG Holdings, Inc. No LLC Member beneficially owns five percent or greater but less than ten percent of DE Holdings. Five other firms as well as various individuals each beneficially own less than five percent of DE Holdings.

2. *The Combination*

On August 23, 2013, an Agreement and Plan of Merger (the ''Merger Agreement'') was entered into among Current BGM, New BGM, DE Holdings, Blue Merger Sub, Delta Merger Sub, and Cole, Schotz, Meisel, Forman & Leonard, P.A., solely in its capacity as representative of the LLC Members. Pursuant to and subject to the terms of the Merger Agreement, at the Closing, among other things:

(i) Blue Merger Sub will be merged with and into Current BGM, whereupon the separate existence of Blue Merger Sub will cease and Current BGM will be the surviving company (the ''BATS Merger'');

(ii) Delta Merger Sub will be merged with and into DE Holdings, whereupon the separate existence of Delta Merger Sub will cease and DE Holdings will be the surviving company (the ''Direct Edge Merger'');

(iii) by virtue of the BATS Merger and without any action required on the part of Current BGM, New BGM, Blue Merger Sub or any holder of Current BGM stock, each outstanding share of Current BGM stock issued and outstanding will be converted into the right to receive shares of New BGM stock, and each outstanding share of Blue Merger Sub issued and outstanding will be converted into one share of Current BGM, such that Current BGM will become a wholly owned subsidiary of New BGM; and

(iv) by virtue of the Direct Edge Merger and without any action required on the part of DE Holdings, New BGM, Delta Merger Sub, or any LLC Member, each LLC Member's membership interests in DE Holdings will be converted into the right to receive shares of New BGM stock, and each unit of ownership interest of Delta Merger Sub issued and outstanding will be converted into one unit of ownership of DE Holdings, such that DE Holdings will become a wholly owned subsidiary of New BGM.

Upon the Closing, each of Current BGM and New BGM will amend and restate their respective certificates of incorporation to, among other things, change their names such that New BGM will be renamed ''BATS Global Markets, Inc.'' and Current BGM will be renamed ''BATS Global Markets Holdings, Inc.''

3. *Post-Closing Corporate Structure*

As a result of the Combination, New BGM will own (i) 100 percent of the

[4] The term ''Exchange Rules'' refers to the rules of the Exchange.

[5] 15 U.S.C. 78f(a).

[6] For purposes of this Proposed Rule Change, references to the beneficial ownership of a ''firm'' refers to the aggregate beneficial ownership of the firm and its affiliated entities.

equity interest in BGM Holdings (the entity previously referred to as ''Current BGM''), and (ii) 100 percent of the LLC membership interests in DE Holdings. BGM Holdings will continue to own 100 percent of the equity interest in each BATS Exchange and BATS Trading. DE Holdings will continue to own 100 percent of the equity interest in DE Route[7] and DEI. DEI will, in turn, continue to own 100 percent of the equity interest in each DE Exchange. Each of the BATS Exchanges and BATS Trading, on the one hand, and the DE Exchanges and DE Route, on the other hand, will continue to operate separately.

New BGM, as the new top-level holding company for the combined businesses, will have widely dispersed ownership, divided among the several firms and individuals that previously held equity interests in each of Current BGM and DE Holdings. Of the firms and individuals that are expected to hold equity interests in New BGM after the Closing, none will beneficially own 20 percent or greater of New BGM and only an affiliate of KCG Holdings, Inc. will beneficially own ten percent or greater. Seven firms will beneficially own five percent or greater but less than ten percent, while 12 other firms as well as various individuals will each beneficially own less than five percent of New BGM.[8]

[7] As described above, the Combination will result in a change of ownership of both BATS Trading and DE Route, each of which is a member of the Financial Industry Regulatory Authority, Inc. (''FINRA''). The Exchange understands that, pursuant to NASD Rule 1017, each of BATS Trading and DE Route is seeking approval for this change of ownership from FINRA.

[8] ISE Holdings, which will beneficially own greater than five percent but less than ten percent of New BGM, will receive common stock of New BGM designated as Class A Non-Voting Common Stock. As set forth in the proposed New BGM Charter and described below, shares of Class A Non-Voting Common Stock are generally non-voting, except with respect to certain actions that would adversely affect the preferences, rights or powers of the holders of Class A Non-Voting Common Stock disproportionately relative to Voting Common Stock or the Class B Non-Voting Common Stock. *See* New BGM Charter, Art. FOURTH, para. (b)(ii). Pursuant to the New BGM Charter and the Investor Rights Agreement expected to be entered into at Closing and attached as Exhibit A to the New BGM Bylaws (the ''Investor Rights Agreement''), ISE Holdings' shares of Class A Non-Voting Common Stock may convert to Voting Common Stock (i) automatically with respect to any shares transferred to persons other than Related Persons of ISE Holdings; (ii) upon the termination of the Investor Rights Agreement; and (iii) automatically with respect to any shares of Class A Non-Voting Common Stock sold by ISE Holdings in any public offering of the stock of New BGM. *See* New BGM Charter, Art. FOURTH, para. (c); Investor Rights Agreement, Section 2.2(j).

4. *Voting and Ownership Limitations of Current BGM; Resolutions*

The Current BGM Charter provides that (i) no person, either alone or together with its ''Related Persons,''[9] may own, directly or indirectly, of record or beneficially, shares constituting more than 40 percent of any class of its capital stock, and no Exchange Member, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, shares constituting more than 20 percent of any class of its capital stock (collectively, the ''BGM Ownership Limitation''), and (ii) subject to certain exceptions, no person, either alone or together with its Related Persons, at any time, may, directly, indirectly or pursuant to any of various arrangements, vote or cause the voting of shares or give any consent or proxy with respect to shares representing more than 20 percent of the voting power of its then issued and outstanding capital stock (the ''BGM Voting Limitation'').[10] Purported transfers that would result in a violation of the BGM Ownership Limitation are not recognized by Current BGM to the extent of any ownership in excess of the BGM Ownership Limitation, and purported voting or voting arrangements in violation of the BGM Voting Limitation are not honored by Current BGM to the extent of any voting in excess of the limitation.[11]

However, the Current BGM Charter provides that each of the BGM Ownership Limitation and the BGM Voting Limitation may be waived (except with respect to Exchange Members and their Related Persons) pursuant to a resolution duly adopted by the board of directors of Current BGM if, in connection with taking such action, the board of directors states in such resolution that it is the determination of the board of directors that the waiver:

• Will not impair the ability of each BATS Exchange to carry out its functions and responsibilities as an ''exchange'' under the Act and the rules and regulations promulgated thereunder;

• is otherwise in the best interests of Current BGM, its stockholders, and each BATS Exchange;

• will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder; and

• shall not be effective until it is filed with and approved by the Commission.[12]

In granting such a waiver, the Current BGM board of directors has the discretion to impose on the person and its Related Persons, such conditions and restrictions that it deems necessary, appropriate or desirable in furtherance of the objectives of the Act and the rules and regulations promulgated thereunder, and the governance of each BATS Exchange.[13]

In addition, notwithstanding the above, the Current BGM Charter provides[14] that in any case where a person, either alone or with its Related Persons, would own or vote more than the BGM Ownership Limitation or BGM Voting Limitation, respectively, upon consummation of any proposed sale, assignment or transfer of Current BGM's capital stock, such a transaction will not become effective until the Current BGM board of directors determines, by resolution, that such person and its

[9] The Current BGM Charter generally defines a ''Related Person'' as, with respect to any person, (i) any ''affiliate'' of such person (as defined in Rule 12b–2 under the Act); (ii) any other person with which such first person has any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of shares of the capital stock of Current BGM (provided no person is deemed a Related Person pursuant to clause (ii) solely as a result of such person's being or becoming a party to the Investor Rights Agreement entered into by and among Current BGM and the stockholders named therein on January 1, 2008); (iii) in the case of a person that is a company, corporation or similar entity, any executive officer (as defined under Rule 3b–7 under the Act) or director of such person and, in the case of a person that is a partnership or limited liability company, any general partner, managing member or manager of such person, as applicable; (iv) in the case of any person that is a registered broker or dealer that has been admitted to membership in either of the BATS Exchanges (for purposes of this definition of ''Related Person,'' each such national securities exchange shall be referred to generally as an ''Exchange'' and any member of such Exchange, an ''Exchange Member''), any person that is associated with the Exchange Member (as determined using the definition of ''person associated with a member'' as defined under Section 3(a)(21) of the Act); (v) in the case of a person that is a natural person and Exchange Member, any broker or dealer that is also an Exchange Member with which such person is associated; (vi) in the case of a person that is a natural person, any relative or spouse of such person, or any relative of such spouse who has the same home as such person or who is a director or officer of Current BGM or any of its parents or subsidiaries; (vii) in the case of a person that is an executive office (as defined under Rule 3b–7 under the Act) or a director of a company, corporation or similar entity, such company, corporation or entity, as applicable; and (viii) in the case of a person that is a general partner, managing member or manager of a partnership or limited liability company, such partnership or limited liability company, as applicable. *See* Current BGM Charter, Art. FIFTH, para. (a)(ii).

[10] *See* Current BGM Charter, Art. FIFTH, para. (b).

[11] *See* Current BGM Charter, Art. FIFTH, para. (d).

[12] *See* Current BGM Charter, Art. FIFTH, para. (b)(ii)(B).

[13] *Id.*

[14] *See* Current BGM Charter, Art. FIFTH, para. (b)(iii).

Related Persons are not subject to any ''statutory disqualification,'' as defined in Section 3(a)(39) of the Act.[15]

As described above, upon the Closing of the proposed Combination, New BGM will become the sole owner of Current BGM (referred to as ''BGM Holdings'' upon the Closing and thereafter). Additionally, as discussed in more detail below, the Exchange is also seeking the Commission's approval for Current BGM's proposal to, contemporaneously with the Closing, amend and restate the Current BGM Charter as the BGM Holdings Charter, and for New BGM to adopt the New BGM Charter. Unlike the Current BGM Charter, as proposed to be amended, the BGM Holdings Charter will not contain the BGM Ownership Limitation or the BGM Voting Limitation.[16] While the BGM Ownership Limitation and BGM Voting Limitation will not be contained in the BGM Holdings Charter, the BGM Holdings Charter specifies that BGM Holdings' sole stockholder will be New BGM, and the New BGM Charter will contain substantively identical ownership and voting limitation provisions, which will also become effective contemporaneously with the Closing.[17]

As a result, New BGM's acquisition of ownership and voting rights in BGM Holdings upon Closing would not cause New BGM to contravene the BGM Ownership Limitation or BGM Voting Limitation, because the Current BGM Charter will be contemporaneously amended to eliminate the BGM Ownership Limitation and the BGM Voting Limitation, and the New BGM Charter will be contemporaneously amended with respect to New BGM's stockholders.

Nevertheless, because the Combination will result in a change of ownership of Current BGM (in that New BGM will become the sole stockholder of Current BGM), the Exchange and the board of directors of Current BGM each believe that it is appropriate for the board of directors of Current BGM to adopt the Resolutions, attached as Exhibit 5A, making certain determinations with respect to New BGM and the Combination similar to those that would be necessary to waive the BGM Ownership Limitation and BGM Voting Limitation. Specifically, the board of directors of Current BGM determined that:

- The acquisition of the proposed ownership by New BGM in Current BGM will not impair the ability of each BATS Exchange to carry out its functions and responsibilities as an ''exchange'' under the Act and the rules and regulations promulgated thereunder, is otherwise in the best interests of Current BGM, its stockholders and the BATS Exchanges, and will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder;
- the acquisition or exercise of the proposed voting rights by New BGM in Current BGM will not impair the ability of each BATS Exchange to carry out its functions and responsibilities as an ''exchange'' under the Act and the rules and regulations promulgated thereunder, that it is otherwise in the best interests of the Current BGM, its stockholders and the BATS Exchanges, and that it will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder;
- neither New BGM, nor any of its Related Persons, is subject to ''statutory disqualification'' within the meaning of Section 3(a)(39) of the Act; [18] and
- neither New BGM, nor any of its Related Persons (excluding BATS Trading, an Exchange Member whose affiliation with the Exchanges has been approved/permitted by the Commission pursuant to Rule 2.11 and Rule 2.12 of each Exchange),[19] is an Exchange Member.[20]

The Exchange has reviewed such Resolutions and requests that the Commission approve such Resolutions. The Exchange believes that the Commission should approve the Resolutions, as the Combination will not impair the ability of either BATS Exchange to carry out its functions and responsibilities as an ''exchange'' under the Act and the rules and regulations promulgated thereunder, or the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder. The BATS Exchanges will continue to operate and regulate their markets and Members as they have done prior to the Combination. Thus, each BATS Exchange will continue to enforce the Act, the Commission's rules thereunder, and each Exchange's own rules, in the manner it does today. Further, the Commission will continue to have plenary regulatory authority over the BATS Exchanges, as is currently the case with these entities.

The Exchange also notes that the Resolutions reflect the determination by the Current BGM board of directors that the Combination and New BGM's resulting ownership and voting rights in BGM Holdings are otherwise in the best interests of Current BGM, its stockholders, and the BATS Exchanges.

In addition, the Exchange notes that notwithstanding the Resolutions and the Combination, the BGM Ownership Limitation and the BGM Voting Limitation will remain in place with respect to potential future transactions involving the ultimate parent company of the BATS Exchanges. As described in more detail below, the Exchange is also proposing the adoption of the New BGM Charter and the New BGM Bylaws, which are modeled in large part on the Current BGM Charter and the Current BGM Bylaws (and include provisions substantially identical to the BGM Ownership Limitation and the BGM Voting Limitation), creating an ownership structure that will continue to provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Act with respect to the Exchange, its direct and indirect parent entities, and its directors, officers, employees and agents to the extent they are involved in the activities of the Exchange, and protect the independence of the Exchange's self-regulatory activities.

The Exchange therefore requests that the Commission approve the Resolutions, attached as Exhibit 5A.

5. Adoption of New BGM Charter and New BGM Bylaws

New BGM was incorporated on August 22, 2013, under the name BATS Global Markets Holdings, Inc., by filing a certificate of incorporation with the Secretary of State of Delaware. Upon incorporation, New BGM also adopted bylaws. New BGM is currently a shell company, with no material assets or operations. Therefore, neither its certificate of incorporation nor bylaws currently need or contain any provisions that would be appropriate for an entity that has direct or indirect ownership in a registered national securities exchange.

[15] 15 U.S.C. 78c(a)(39).

[16] *See infra* text accompanying note 58.

[17] *See infra* text accompanying notes 23 through 27.

[18] 15 U.S.C. 78c(a)(39).

[19] As noted above, BATS Trading is a routing broker-dealer and an Exchange Member that is affiliated with the Exchange, pursuant to Exchange Rules 2.11 and 2.12, and a direct subsidiary of Current BGM. The same structure will continue to be in place following the Closing and BATS Trading will remain a direct subsidiary of BGM Holdings.

[20] In addition, the Resolutions contain a determination that the execution and delivery of the Merger Agreement by New BGM constituted notice of New BGM's intention to acquire ownership and voting rights in excess of the BGM Ownership Limitation and BGM Voting Limitation, respectively, in writing and not less than 45 days before the Closing. *See* Current BGM Charter, Art. FIFTH, para. (b)(iv).

However, in connection with the Combination, upon the Closing, New BGM will become (i) the indirect owner (through BGM Holdings) of each of the BATS Exchanges and BATS Trading, (ii) the indirect owner (through DE Holdings and DEI) of each of the DE Exchanges, and (iii) the indirect owner (through DE Holdings) of DE Route. As a result, the Exchange is proposing that in connection with New BGM's acquisition of indirect ownership in the Exchange, New BGM would amend and restate each of its certificate of incorporation and bylaws to adopt provisions designed to protect and maintain the integrity of the self-regulatory functions of the Exchange and to facilitate the ability of the Exchange and the Commission to carry out their regulatory and oversight obligations under the Act. Each of the New BGM Charter and the New BGM Bylaws is modeled on, and substantially similar to, the Current BGM Charter and Current BGM Bylaws, respectively, except with respect to the differences described below.

a. New BGM Charter

The New BGM Charter is proposed to be adopted as the Amended and Restated Certificate of Incorporation of BATS Global Markets Holdings, Inc. However, the New BGM Charter will effect an amendment to the name of the corporation upon Closing such that it will be renamed ''BATS Global Markets, Inc.'' [21] The change of name is intended to reflect the fact that New BGM is succeeding to the business of Current BGM in all respects, notwithstanding the technical change of corporate entity that will result from the structure of the Combination.

The New BGM Charter, which is attached as Exhibit 5B, is substantially similar to the Current BGM Charter, which the Commission has previously found to be consistent with the Act.[22] It contains provisions imposing the BGM Ownership Limitation and the BGM Voting Limitation on any owners or prospective owners of New BGM.[23] In addition, similar to the Current BGM Charter, the New BGM Charter prohibits a Member of any of New BGM's registered national securities exchange subsidiaries, either alone or together with such Member's Related Persons,[24] from owning, directly or indirectly, of record or beneficially, more than 20 percent of shares of any class of capital stock of New BGM.[25] As in the Current BGM Charter, purported sales, transfers, assignments, pledges or ownership that would result in a violation of the BGM Ownership Limitation will not be recognized by New BGM to the extent of any ownership in excess of the limitation, and New BGM shall have the right to redeem the shares in excess of the applicable ownership limit for their fair market value. In addition, in contrast to the Current BGM Charter, the New BGM Charter would clarify that these same non-recognition and redemption rights apply in the case of a purported conversion of shares resulting in a violation of the BGM Ownership Limitation, as apply to purported sales, transfers, assignments, pledges or ownership that result in such a violation.[26] Similarly, as in the Current BGM Charter, purported voting or voting arrangements in violation of the BGM Voting Limitation will not be honored by New BGM to the extent of any voting in excess of the limitation.[27]

These provisions are designed to prevent any stockholder from exercising undue control over the operation of the BATS Exchanges or the DE Exchanges (together, the ''Exchange Subsidiaries''), each of which New BGM will indirectly own following the Combination, and to assure that each Exchange Subsidiary and the Commission are able to carry out their regulatory obligations under the Act.

Further, consistent with the Current BGM Charter, the New BGM Charter provides that, for so long as New BGM controls, directly or indirectly, a registered national securities exchange, before any amendment to the New BGM Charter may be effective, those changes must be submitted to the board of directors of each such exchange, and if the amendment is required to be filed with, or filed with and approved by the Commission pursuant to Section 19(b) of the Act, [28] such change shall not be effective until filed with, or filed with and approved by, the Commission.[29] The Exchange believes that these provisions will assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.

The provisions of the New BGM Charter differ from those of the Current BGM Charter in certain limited respects:

- The total number of shares of common stock that New BGM will have authority to issue is 75,000,000, divided between 55,000,000 shares designated as Voting Common Stock, 10,000,000 shares designated as Class A Non-Voting Common Stock, and 10,000,000 shares designated as Class B Non-Voting Common Stock.[30] This represents an increase from the 25,000,000 shares that Current BGM is authorized to issue (divided between 24,500,000 shares designated as Voting Common Stock and 500,000 shares designated as Non-Voting Common Stock). The increase in authorized shares is due to the greater number of stockholders that New BGM will have following the Combination, as compared to Current BGM, as well as to provide an adequate number of authorized shares to allow for potential future issuances. The rights and preferences of the Class A Non-Voting Common Stock and Class B Non-Voting Common Stock are identical in all respects, except for conversion rights. Class A Non-Voting Common Stock converts into Voting Common Stock automatically upon transfer to a person other than a Related Person of such holder, upon termination of the Investor Rights Agreement, and may be converted into Voting Common Stock at any time at the option of the holder.[31] Class B Non-Voting Common Stock, however, may only be converted into Voting Common Stock following a ''Qualified Transfer.'' [32] The term

[21] *See* New BGM Charter, Art. FIRST.

[22] *See* Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008).

[23] *See* New BGM Charter, Art. FIFTH paras. (b)(i)(A) and (C).

[24] The New BGM Charter defines ''Related Persons'' consistent with the definition in the Current BGM Charter, *see supra* note 9, except that (i) the definition of ''Exchange'' for purposes of such definition is expanded to refer to any national securities exchange that is a direct or indirect subsidiary of New BGM, and (ii) the reference to the Investor Rights Agreement has been revised to refer to the Investor Rights Agreement to be entered into upon Closing.

[25] *See* New BGM Charter, Art. FIFTH para. (b)(i)(B).

[26] *See* New BGM Charter, Art. FIFTH, paras. (d)–(e).

[27] *See* New BGM Charter, Art. FIFTH, para. (d).

[28] 15 U.S.C. 78s(b).

[29] *See* New BGM Charter, Art. TWELFTH.

[30] *See* New BGM Charter, Art. FOURTH, para. (a).

[31] *See* New BGM Charter, Art. FOURTH, para. (c). In addition, Class A Non-Voting Common Stock held by ISE Holdings will convert automatically if ISE Holdings includes any such shares in any public offering of stock of New BGM.

[32] The Exchange notes that, notwithstanding the conversion features, neither Class A Non-Voting Common Stock nor Class B Non-Voting Common Stock may convert into Voting Common Stock if such a conversion would cause the stockholder to own, alone or with its Related Persons, directly or indirectly, of record or beneficially (i) more than 40% of any class of capital stock of New BGM in contravention of the BGM Ownership Limitation (unless a waiver is granted by the board of directors of New BGM and approved by the Commission), or (ii) in the case of an Exchange Member stockholder, more than 20% of any class of capital stock of New BGM. *See* New BGM Charter, Art. FIFTH, para. (b)(i)(A) and (B). In addition, to the extent that any Class A Non-Voting Common Stock or Class B Non-Voting Common Stock is converted into Voting Common Stock, the stockholder owning the converted Voting Common Stock would be subject to the BGM Voting Limitation and not permitted, either alone or together with its Related Persons, at any time, directly, indirectly or pursuant to any of

Continued

''Qualified Transfer'' means a sale or other transfer of Class B Non-Voting Common Stock by a holder of such shares: (a) In a widely distributed public offering registered pursuant to the Securities Act of 1933; [33] (b) in a private sale or transfer in which the relevant transferee (together with its Affiliates, as defined below, and other transferees acting in concert with it) acquires no more than two percent of any class of voting shares (as defined in 12 CFR 225.2(q)(3) and determined by giving effect to any such permitted conversion of transferred shares of Class B Non-Voting Common Stock upon such transfer pursuant to Article FOURTH of the New BGM Charter), (c) to a transferee that (together with its Affiliates and other transferees acting in concert with it) owns or controls more than 50 percent of any class of voting shares (as defined in 12 CFR 225.2(q)(3)) of New BGM without regard to any transfer of shares from the transferring holder of shares of Class B Non-Voting Common Stock, or (d) to New BGM. As used above, the term ''Affiliate'' means, with respect to any person, any other person directly or indirectly controlling, controlled by or under common control with such person, and ''control'' (including, with correlative meanings, the terms ''controlled by'' and ''under common control with'') has the meaning set forth in 12 CFR 225.2(e)(1).[34] The Exchange understands that certain persons that will become stockholders of New BGM as of the Closing may be, or may become, subject to restrictions under the Bank Holding Company Act of 1956 [35] on the extent to which they are permitted to own voting stock of New BGM or certain types of non-voting stock convertible into voting stock of New BGM. The Exchange understands that New BGM's Class B Non-Voting Common Stock is designed to permit a stockholder that may be subject to such restrictions to maintain an economic interest in New BGM, through ownership of Class B Non-Voting Common Stock, in excess of its voting interest and in compliance with such restrictions, for purposes of the Bank Holding Company Act of 1956.

- The term ''Exchange,'' as used in the New BGM Charter, is defined to refer to ''any national securities exchange registered under Section 6 of the Act with the [Commission] that is a direct or indirect subsidiary'' of New BGM.[36] The term ''Exchange'' is used throughout the New BGM Charter to refer to subsidiaries of New BGM that are registered as national securities exchanges. This definition differs from the definition contained in the Current BGM Charter, which defines ''Exchange'' by specific reference to the names of the BATS Exchanges. Because, following the Combination, the DE Exchanges will also become indirect subsidiaries of New BGM, the definition in the New BGM Charter has been expanded so as to capture the DE Exchanges in addition to the BATS Exchanges.
- The New BGM Charter reflects certain non-substantive differences and typographical corrections, including conforming the spelling of ''Bylaws'' throughout the organizational documents of New BGM and its proposed subsidiaries.

b. New BGM Bylaws

As with the New BGM Charter, the New BGM Bylaws, which are set forth in Exhibit 5C, contain provisions substantially similar to those of the Current BGM Bylaws, which the Commission has previously found to be consistent with the Act.[37] This includes provisions that are designed to maintain the independence of the self-regulatory functions of the Exchange Subsidiaries. Consistent with the Current BGM Bylaws, the New BGM Bylaws provide that New BGM and its officers, directors, employees and agents submit to the Commission's jurisdiction with respect to activities relating to any of the Exchange Subsidiaries,[38] and, for so long as New BGM controls, directly or indirectly, such Exchange Subsidiary, New BGM agrees to provide the Commission and each Exchange Subsidiary with access to its books and records that are related to the operation or administration of the Exchange Subsidiary.[39] In addition, to the extent they are related to the operation or administration of an Exchange Subsidiary, the books, records, premises, officers, directors, agents, and employees of New BGM shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Exchange Subsidiary for purposes of, and subject to oversight pursuant to, the Act.[40]

The New BGM Bylaws also provide that all books and records of an Exchange Subsidiary reflecting confidential information pertaining to the self-regulatory function of the Exchange Subsidiary (including but not limited to disciplinary matters, trading data, trading practices and audit information) that shall come into the possession of New BGM shall not be made available other than to those officers, directors, employees and agents of New BGM that have a reasonable need to know the contents thereof, and shall be retained in confidence by New BGM, the members of its board of directors, its officers, employees and agents, and not used for any non-regulatory purposes.[41] The New BGM Bylaws, however, specify that the New BGM Bylaws (including these confidentiality provisions) shall not be interpreted so as to limit or impede the rights of the Commission or an Exchange Subsidiary to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of New BGM to disclose such confidential information to the Commission or an Exchange Subsidiary.[42]

In addition, for so long as New BGM controls, directly or indirectly, an Exchange Subsidiary, the directors, officers, employees and agents of New BGM are required to give due regard to the preservation of the independence of each Exchange Subsidiary's self-regulatory functions, and to its obligations to investors and the general public, and not take any actions which would interfere with the effectuation of decisions by the board of directors of such Exchange Subsidiary relating to regulatory functions (including disciplinary matters) or which would interfere with such Exchange Subsidiary's ability to carry out its responsibilities under the Act.[43] Further, the New BGM Bylaws require that, for so long as New BGM controls, directly or indirectly, an Exchange Subsidiary, before any amendment to or repeal of any provision of the New BGM Bylaws may be effective, those changes must be submitted to the board of directors of each Exchange Subsidiary, and, if such amendment is required to be filed with, or filed with and

various arrangements, to vote or cause the voting of shares or give any consent or proxy with respect to shares representing more than 20 percent of the voting power of the then issued and outstanding capital stock of New BGM (unless a waiver is granted by the board of directors of New BGM and approved by the Commission). *See* New BGM Charter, Art. FIFTH, para. (b)(i)(C).

[33] 15 U.S.C. 77a.

[34] *See* New BGM Charter, Art. FOURTH, para. (d)(i).

[35] 12 U.S.C. 1841 *et seq.*

[36] *See* New BGM Charter, Art. FIFTH, para. (a)(ii).

[37] *See* Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008).

[38] *See* New BGM Bylaws, Section 14.05.

[39] *See* New BGM Bylaws, Section 14.03.

[40] *Id.*

[41] *See* New BGM Bylaws, Section 14.02.

[42] *See id.*

[43] *See* New BGM Bylaws, Section 14.01.

approved by, the Commission before the changes may be effective under Section 19 of the Act and the rules promulgated thereunder, then the proposed changes shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.[44] The Exchange believes that these provisions will assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.

The provisions of the New BGM Bylaws differ from those of the Current BGM Bylaws in certain limited respects:

- The New BGM Bylaws provide for two separate corporate officer positions, one known as the Chief Executive Officer and another known as the President. The Current BGM Bylaws, in contrast, provide for a combined position known as the President and Chief Executive Officer.[45] Under the New BGM Bylaws, the Chief Executive Officer will be the chief executive officer of New BGM and subject to the control of the board of directors of New BGM, has general supervision, direction and control of the business and affairs of New BGM,[46] while the President will be a senior executive officer with certain designated powers, among other things, to serve as the chief executive officer in the absence or disability of the Chief Executive Officer.[47] References to corporate officers throughout the New BGM Bylaws reflect this difference. The difference in corporate officer designations is intended to facilitate the anticipated executive leadership of New BGM following the Combination. It is anticipated that, following the Combination, the current President and Chief Executive Officer of Current BGM will become the Chief Executive Officer of New BGM, while the current Chief Executive Officer of DE Holdings will become the President of New BGM.
- The New BGM Bylaws provide for a board of directors consisting of 15 members, or such other number of members as the board of directors determines from time to time. The Current BGM Bylaws provide that the board of directors will consist of one or more members, as determined by resolution of the board of directors.[48] The size of the New BGM board is proposed to be initially set at 15 in order to reflect the anticipated initial membership of the board of directors of New BGM. The Current BGM board of directors currently has 13 members. After the Closing, it is anticipated that the New BGM board of directors will consist of the same members as the Current BGM board, except that the New BGM board will be expanded by two members, to include representatives of two additional firms that are currently LLC Members of DE Holdings but will, by virtue of the Combination, become stockholders of New BGM.
- Section 5.02(a) of the Current BGM Bylaws sets forth the process for representatives of Current BGM to attend meetings of, and vote the shares of, any corporation, partnership or other entity (including each BATS Exchange) in which Current BGM may hold stock, partnership, or other equity interests. This provision parenthetically refers to the BATS Exchanges to reflect the fact that Current BGM is the direct owner of each of the BATS Exchanges. However, following the Combination, New BGM will instead be the direct owner of each of BGM Holdings and DE Holdings. The corresponding provision in the New BGM Bylaws therefore contains a similar parenthetical reference to its ownership of BGM Holdings and DE Holdings, rather than the BATS Exchanges.[49] In addition, the New BGM Bylaws include a reference to meetings of ''members'' of any ''limited liability company'' in which New BGM holds equity interests, which terms are not included in the corresponding provision in the Current BGM Bylaws.[50] This is intended to reflect the fact that New BGM will, following the Closing, be the sole member of DE Holdings, a limited liability company, while Current BGM does not hold equity in any limited liability companies.[51] In addition, the Current BGM Bylaws contain provisions that relate to Current BGM's voting of shares in the election of directors, and Members of the Member Nominating Committees, of the BATS Exchanges.[52] These provisions will not be applicable to New BGM and are not included in the New BGM Bylaws, as the BATS Exchanges will be directly owned by BGM Holdings, rather than New BGM.[53]
- The term ''Exchange,'' as used in the New BGM Bylaws, is defined to refer to ''any national securities exchange registered with the [Commission] under Section 6 of the [Act] that is a direct or indirect subsidiary'' of New BGM.[54] The term ''Exchange'' is used throughout the New BGM Bylaws to refer to subsidiaries of New BGM that are registered as national securities exchanges. The Current BGM Bylaws either refer to each BATS Exchange by name or define ''Exchange'' by specific reference to the BATS Exchanges. Because, following the Combination, the DE Exchanges will also become indirect subsidiaries of New BGM, the definition in the New BGM Bylaws has been expanded so as to capture the DE Exchanges in addition to the BATS Exchanges.
- The New BGM Bylaws reflect certain non-substantive updates to dates of agreements and cross-references, as well as typographical corrections, including conforming the spelling of ''Bylaws'' throughout the organizational documents of New BGM and its proposed subsidiaries.

6. Adoption of BGM Holdings Charter and BGM Holdings Bylaws

Effective as of the Closing of the Combination, BGM Holdings (previously referred to as Current BGM) will continue to hold direct ownership of the BATS Exchanges and BATS Trading, but will no longer be the ultimate holding company of the corporate structure, itself being a wholly owned subsidiary of New BGM. As a result, provisions of the Current BGM Charter and Current BGM Bylaws, which contemplate an entity that was the ultimate holding company in the corporate structure, will no longer be appropriate. The Exchange is therefore proposing the amendment and restatement of each of the Current BGM Charter (as amended, referred to as the ''BGM Holdings Charter'') and the Current BGM Bylaws (as amended, referred to as the ''BGM Holdings Bylaws''). Each of the proposed BGM Holdings Charter and the BGM Holdings Bylaws are modeled on, and substantially similar to, the current certificate of incorporation and bylaws, respectively, of DEI, which is similarly situated as an intermediate holding company between DE Holdings and the DE Exchanges. The Commission has previously found the DEI certificate of incorporation and bylaws to be consistent with the Act.[55]

Following the Closing, BGM Holdings will be the sole stockholder of the BATS Exchanges. Although BGM Holdings will not carry out any regulatory

[44] *See* New BGM Bylaws, Art. XII.

[45] *Compare* New BGM Bylaws, Sections 4.01 and 4.02 *with* Current BGM Bylaws, Sections 4.01 and 4.02(c) and (d).

[46] *See* New BGM Bylaws, Section 4.02(c).

[47] *See* New BGM Bylaws, Section 4.02(d).

[48] *Compare* New BGM Bylaws, Section 3.01 *with* Current BGM Bylaws, Section 3.01.

[49] *See* New BGM Bylaws, Section 5.02.

[50] *Id.*

[51] *Compare* New BGM Bylaws, Section 5.02 *with* Current BGM Bylaws, Section 5.02.

[52] *See* Current BGM Bylaws, Sections 5.02(b) and (c).

[53] Substantially identical provisions are instead included in the BGM Holdings Bylaws. *See infra* text accompanying note 70.

[54] *See* New BGM Bylaws, Section 10.02.

[55] *See* Securities Exchange Act Release No. 62515 (July 16, 2010), 75 FR 43584 (July 26, 2010) (SR–EDGX–2010–02).

functions, the Exchange notes that its activities with respect to the operation of the BATS Exchanges must be consistent with, and must not interfere with, the self-regulatory obligations of each BATS Exchange. The BGM Holdings Charter and the BGM Holdings Bylaws therefore include certain provisions that are designed to maintain the independence of the BATS Exchanges' self-regulatory functions, enable the BATS Exchanges to operate in a manner that complies with the federal securities laws, including the objectives of Sections 6(b) [56] and 19(g) [57] of the Act, and facilitate the ability of each BATS Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act.

a. BGM Holdings Charter

With respect to ownership and control of BGM Holdings, the proposed BGM Holdings Charter, attached as Exhibit 5D, specifically provides that BGM Holdings' sole stockholder will be New BGM.[58] This restriction is designed to assure that any change to the ownership or control of the BATS Exchanges may only occur through a change in the ownership or control of New BGM. As such, any purported change of such ownership or control would need to comply with the New BGM Charter and New BGM Bylaws, including the BGM Ownership Limitation and the BGM Voting Limitation (or a Commission-approved waiver therefrom).

The proposed BGM Holdings Charter further specifies that nothing contained therein or in the BGM Holdings Bylaws shall be applicable where the application of the provision would interfere with the effectuation of any and all decisions relating to the regulatory functions of the BATS Exchanges (including disciplinary matters) or the structure of the market that each BATS Exchange regulates, or would interfere with the ability of each BATS Exchange to carry out its responsibilities under the Act or oversee the market that each regulates.[59]

In addition, the proposed BGM Holdings Charter provides that for so long as BGM Holdings controls, directly or indirectly, a registered national securities exchange, before any amendment to or repeal of any provision of the BGM Holdings Charter may be effective, those changes shall be submitted to the board of directors of each such exchange, and if the same must be filed with, or filed with and approved by, the Commission before the changes may be effective under Section 19 of the Act [60] and the rules promulgated thereunder, then such proposed changes shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.[61]

b. BGM Holdings Bylaws

The proposed BGM Holdings Bylaws, attached as Exhibit 5E, contain several provisions designed to protect the independence of the self-regulatory functions of the BATS Exchanges. The proposed BGM Holdings Bylaws require that, for so long as BGM Holdings, directly or indirectly, controls a BATS Exchange, BGM Holdings' board of directors, officers, employees and agents must give due regard to the preservation of independence of the self-regulatory functions of each BATS Exchange and not interfere with the effectuation of any decisions by either of the BATS Exchange boards of directors relating to its regulatory functions (including disciplinary matters) or which would interfere with the ability of such exchange to carry out its responsibilities under the Act.[62] The BGM Holdings Bylaws would further require that BGM Holdings comply with the U.S. federal securities laws and rules and regulations thereunder and shall cooperate with the Commission and each BATS Exchange, as applicable, pursuant to and to the extent of their respective regulatory authority.[63] Pursuant to the BGM Holdings Bylaws, BGM Holdings' officers, directors, employees and agents shall be deemed to agree to (i) comply with the U.S. federal securities laws and the rules and regulations thereunder; and (ii) to cooperate with the Commission and each BATS Exchange in respect of the Commission's oversight responsibilities regarding the BATS Exchanges and their self-regulatory functions and responsibilities of the BATS Exchanges, and BGM Holdings will take reasonable steps to cause its officers, directors, employees and agents to so cooperate.[64]

Furthermore, BGM Holdings and its officers, directors, employees and agents will be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and each BATS Exchange, as applicable, for purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws or the rules or regulations thereunder arising out of, or relating to, the activities of such exchange.[65]

The proposed BGM Holdings Bylaws also contain a number of provisions designed to ensure that the BATS Exchanges have sufficient access to the books and records of BGM Holdings. Pursuant to the BGM Holdings Bylaws, the books, records, premises, officers, directors, agents, and employees of BGM Holdings are deemed to be the books, records, premises, officers, directors, agents and employees of the BATS Exchanges to the extent they are related to the operation or administration of such exchange.[66] In addition, for as long as BGM Holdings controls, directly or indirectly, the BATS Exchanges, BGM Holdings' books and records shall be subject at all times to inspection and copying by the Commission and the BATS Exchanges, provided that such books and records are related to the operation or administration of the BATS Exchanges.[67]

The proposed BGM Holdings Bylaws also provide that, to the fullest extent permitted by law, all books and records of the BATS Exchanges reflecting confidential information pertaining to the self-regulatory function of such exchange (including disciplinary matters, trading data, trading practices and audit information) that comes into the possession of BGM Holdings, shall be retained in confidence by BGM Holdings and its stockholders, board of directors, officers, employees and agents, and not be used for any non-regulatory purposes.[68] The proposed BGM Holdings Bylaws provide, however, that the foregoing shall not limit or impede the rights of the Commission or the BATS Exchanges to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or limit or impede the ability of any BGM Holdings stockholders, officers, directors, employees or agents to disclose such confidential information to the Commission or either BATS Exchange.[69]

With respect to the election of directors of the BATS Exchanges, Current BGM is currently the sole and direct stockholder of each of the BATS Exchanges. As noted above, while

[56] 15 U.S.C. 78f(b).

[57] 15 U.S.C. 78s(g).

[58] *See* BGM Holdings Charter, Art. SEVENTH, para. 4.

[59] *See* BGM Holdings Charter, Art. FIFTH, para. 2.

[60] 15 U.S.C. 78s(b).

[61] *See* BGM Holdings Charter, Art. Seventh, para. 3.

[62] *See* BGM Holdings Bylaws, Section 7.1.

[63] *See* BGM Holdings Bylaws, Section 7.2.

[64] *Id.*

[65] *See* BGM Holdings Bylaws, Section 7.3.

[66] *See* BGM Holdings Bylaws, Section 5.8(b).

[67] *Id.*

[68] *See* BGM Holdings Bylaws, Section 5.8(a).

[69] *Id.*

Current BGM will become BGM Holdings, it will continue to hold the direct ownership interest and voting rights in the BATS Exchanges. Therefore, the BGM Holdings Bylaws are proposed to maintain provisions relating to its voting of its interests in the BATS Exchanges that are substantially identical to those contained in the Current BGM Bylaws.[70] In particular, the proposed BGM Holdings Bylaws would continue to provide that at any meeting of the stockholders of either BATS Exchange held for the purpose of electing directors and members of such exchange's Member Nominating Committee, or in the event written consents are solicited or otherwise sought from the stockholders of such BATS Exchange with respect thereto, BGM Holdings will cause all outstanding shares of the BATS Exchange owned by BGM Holdings to be voted in favor of only those Member Representative Directors and nominees for the Member Nominating Committee nominated in accordance with such exchange's bylaws, and, with respect to any written consents, BGM Holdings will only cause to be validly executed written consents electing such directors and members of the Member Nominating Committee.[71] The Exchange believes that this requirement will ensure that BGM Holdings effectuates the election of directors and members of the Exchange's Member Nominating Committee in the manner contemplated by the Exchange's Bylaws, ensuring the fair representation of members in the selection of directors and the administration of the Exchange as required by Section 6(b)(3) of the Act.[72]

Similar to the proposed BGM Holdings Charter, the proposed BGM Holdings Bylaws provide that for so long as BGM Holdings controls either BATS Exchange, before any amendment to or repeal of any provision of the BGM Holdings Bylaws will be effective, those changes must be submitted to the board of directors of each BATS Exchange, and if the same must be filed with, or filed with and approved by, the Commission before the changes may be effective under Section 19 of the Act, [73] and the rules promulgated thereunder, then the proposed changes shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.[74]

Lastly, while as noted above, the BGM Holdings Bylaws are modeled on the current bylaws of DEI (the ''DEI Bylaws''), in contrast with the current DEI Bylaws, the proposed BGM Holdings Bylaws do not contain a provision relating to BGM Holdings' handling of funds derived from the regulatory operations of its exchange subsidiaries (such as regulatory fees, fines and penalties). The Exchange Bylaws and the bylaws of BZX each prohibit the Exchange and BZX, respectively, from distributing any such funds to its stockholder, instead requiring that such funds only be applied to fund the legal and regulatory operations of the respective exchange or pay restitution and disgorgement of funds intended for customers.[75] As a result, BGM Holdings will not be permitted to come into possession of regulatory funds, as they will remain at the respective exchange and used only for permitted purposes. The Exchange therefore believes that including a provision in the BGM Holdings Bylaws relating to the handling by BGM Holdings of such funds is unnecessary and potentially confusing. The Exchange understands that the DE Exchanges are each proposing to amend DEI's bylaws to eliminate the corresponding provision.[76]

7. Bylaws of the Exchange

In connection with the Combination, the Exchange proposes to amend and restate its Second Amended and Restated By-Laws and adopt the amended Exchange Bylaws as its Third Amended and Restated Bylaws, attached as Exhibit 5F. The Exchange proposes making the following amendments to the Exchange Bylaws:

- Amending Article I, paragraph (cc) of the Exchange Bylaws to reflect the change of name of the Exchange's stockholder from Current BGM to BGM Holdings. This amendment is intended to reflect the change in the Exchange's corporate holding structure and corporate name changes described above as well as prevent any change of ownership of the Exchange other than in accordance with the requirements set forth in the organizational documents of the Exchange's parent and indirect parent companies.
- Amending Section 2(b) and Section 3(b) of Article III of the Exchange Bylaws to clarify that the Chief Executive Officer of the Exchange is considered to be an Industry Director, but is excluded from being designated as a member of one of the three classes of directors for purposes of the Board's staggered three-year terms. This amendment is meant to clarify, rather than change, current practice. The Exchange Bylaws require that the Board of Directors be composed of one Director who is the Chief Executive Officer of the Exchange, and a sufficient number of Non-Industry Directors (including Independent Directors), Industry Directors and Member Representative Directors such that (i) the number of Non-Industry Directors, including at least one Independent Director, equals or exceeds the sum of the number of Industry Directors and Member Representative Directors, and (ii) the number of Member Representative Directors equals at least 20 percent of the Board of Directors (the ''Exchange Board Composition Requirements'').[77] Because the definition of ''Industry Director'' includes a Director that has an employment relationship with the Exchange,[78] the Chief Executive Officer of the Exchange will always meet the definition of ''Industry Director.'' Consistent with this definition, and in order to effectuate the Exchange Board Composition Requirements, the Exchange considers the Chief Executive Officer to be an Industry Director. Were the Chief Executive Officer to not be considered for purposes of determining composition of the board, the total number of persons affiliated with the securities industry (including Industry Directors, Member Representative Directors and the Chief Executive Officer) could potentially exceed the number of Non-Industry Directors—a result that the Exchange believes the Exchange Board Composition Requirements were intended to prevent. The Exchange therefore proposes to amend Section 2(b) of Article III of the Exchange Bylaws to explicitly clarify that the Chief Executive Officer shall be considered to be an Industry Director. The Exchange Bylaws separately provide that each of the Non-Industry Directors and Industry Directors are divided into one of three classes to serve staggered three-year terms.[79] Unlike other Industry Directors, rather than serving a three-year term, the Chief Executive Officer of the Exchange serves on the Board of Directors until he or she ceases to be Chief Executive Officer.[80]

[70] *Compare* BGM Holdings Bylaws, Sections 2.15(b) and (c) *with* Current BGM Bylaws, Sections 5.02(b) and (c).

[71] *See* BGM Holdings Bylaws, Sections 2.15(b) and (c).

[72] 15 U.S.C. 78f(b)(3).

[73] 15 U.S.C. 78s.

[74] *See* BGM Holdings Bylaws, Section 6.4.

[75] *See e.g.,* Exchange Bylaws, Art. X, Section 4.

[76] *See* DEI Bylaws, Section 4.6(b).

[77] *See* Exchange Bylaws, Art. III, Section 2(b).

[78] *See* Exchange Bylaws, Art. I, para. (o)(vi).

[79] *See* Exchange Bylaws, Art. III, Section 3(b).

[80] *See* Exchange Bylaws, Art. III, Section 3(a).

The Exchange is therefore proposing to amend Section 3(b) of Article III of the Exchange Bylaws to explicitly clarify that the reference to each Industry Director serving a staggered three-year term excludes the Chief Executive Officer.

- Amending Section 4(a), Section 4(c) and Section 4(e) of Article III of the Exchange Bylaws to permit the Director nomination and election process (including the Member Representative Director nomination and election process conducted by the Member Nominating Committee) to be conducted through either an annual or special meeting of stockholders, rather than solely through an annual meeting of stockholders. Under the current Exchange Bylaws, should one or more vacancies on the Board of Directors occur, the vacancies would continue until they can be filled at an annual meeting. As a result, vacancies that arise soon after an annual meeting could remain for close to a full year. The Exchange therefore proposes to amend the Exchange Bylaws to add flexibility to the governance process around the nomination and election of a Director position that may become vacant at a time that does not coincide with the Exchange's annual director election process, by permitting the process to occur at any time via a special meeting of stockholders.
- Amending Section 2(a) of Article V of the Exchange Bylaws to clarify that the Chairman, with the approval of the Board, not only appoints the members of all committees of the Board, but also the chair of each committee. This amendment is intended to reflect the current committee and committee Chair appointment processes utilized by the Exchange.
- Amending Section 6(c) of Article V of the Exchange Bylaws to clarify that the Regulatory Oversight Committee responsibilities include (i) those with regard to each of the Exchange's facilities, as defined in Section 3(a)(2) of the Act,[81] (ii) assessing the Exchange's regulatory performance, (iii) assisting the Board and committees of the Board in reviewing the regulatory plan and the overall effectiveness of the Exchange's regulatory functions, and (iii) in consultation with the Chief Executive Officer of the Exchange, establishing the goals, assessing the performance, and fixing the compensation of the Chief Regulatory Officer of the Company. These amendments are intended to reflect the current responsibilities of the Regulatory Oversight Committee.
- Deleting as outdated Section 1 of Article XI of the Exchange Bylaws, relating to the interpretation of the Exchange Bylaws prior to the Exchange's commencement of business as a national securities exchange, and renumbering the remaining sections within Article XI accordingly.
- Expanding the prohibition contained in Section 3 of Article XI of the Exchange Bylaws (to be renumbered as Section 2). Currently, Section 3 of Article XI prohibits Current BGM's directors, officers, staff, counsel and advisors who are not also directors, officers, staff, counsel or advisors of the Exchange from participating in any meetings of the Exchange's Board of Directors (or any committee thereof) pertaining to the self-regulatory function of the Exchange (including disciplinary matters). Because, following the Combination, the Exchange will be owned directly by BGM Holdings and indirectly by New BGM, instead of only directly by Current BGM, the Exchange is proposing to expand this prohibition to cover both its direct and indirect parent companies. The Exchange believes that this amendment will protect the independence of the Exchange's self-regulatory activities.
- Correcting certain typographical errors, including conforming the spelling of ''Bylaws'' throughout the organizational documents of the Exchange and its parent companies.

8. Exchange Rule 2.3—Member Eligibility

Pursuant to Exchange Rule 2.3, in order to be eligible for membership in the Exchange, a registered broker or dealer is required to be a member of at least one other national securities association or national securities exchange. However, membership in the Exchange's affiliated national securities exchange, BZX, is not sufficient for purposes of eligibility for Exchange membership. As a result of the Combination, the Exchange will additionally become affiliated with the DE Exchanges. The Exchange continues to believe that it is appropriate to limit its membership to registered broker-dealers that are members of at least one national securities association or national securities exchange that is not affiliated with the Exchange. Therefore, the Exchange proposes to amend Exchange Rule 2.3 to specify that a registered broker-dealer will be eligible for membership only if it is a member of a national securities association or national securities exchange other than BZX, EDGA or EDGX. The proposed amendments to Exchange Rule 2.3 are set forth in Exhibit 5G.

9. Exchange Rule 2.12—DE Route as Inbound Router

BATS Trading provides Members of the Exchange and BZX with optional routing services to other market centers. Thus, in certain circumstances, BATS Trading provides inbound routing from BZX to the Exchange. Exchange Rule 2.12 governs this inbound routing of orders by BATS Trading to the Exchange in BATS Trading's capacity as a facility of BZX. Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange has implemented limitations and conditions on BATS Trading's affiliation with the Exchange in order to permit the Exchange to accept inbound orders that BATS Trading routes in its capacity as a facility of BZX. These conditions and limitations, set forth in Exchange Rule 2.12, require that:

(1) The Exchange must enter into (a) a plan pursuant to Rule 17d–2 under the Act with a non-affiliated self-regulatory organization (''SRO'') to relieve the Exchange of regulatory responsibilities for BATS Trading with respect to rules that are common rules between the Exchange and the non-affiliated SRO, and (b) a regulatory services contract (''Regulatory Contract'') with a non-affiliated SRO to perform regulatory responsibilities for BATS Trading for unique Exchange rules.

(2) The Regulatory Contract must require the Exchange to provide the non-affiliated SRO with information, in an easily accessible manner, regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively ''Exceptions'') in which BATS Trading is identified as a participant that has potentially violated Exchange or Commission Rules, and requires that the non-affiliated SRO provide a report, at least quarterly, to the Exchange quantifying all Exceptions in which BATS Trading is identified as a participant that has potentially violated Exchange or Commission rules.

(3) The Exchange, on behalf of its parent company, must establish and maintain procedures and internal controls reasonably designed to ensure that BATS Trading does not develop or implement changes to its system based on non-public information obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Members of the Exchange.

[81] 15 U.S.C. 78c(a)(2).

(4) The Exchange may furnish to BATS Trading only the same information and on the same terms as the Exchange makes available in the normal course of business to other users.[82]

Similar to the role of BATS Trading with respect to the BATS Exchanges, the Exchange understands that DE Route provides members of the DE Exchanges with optional routing services to other market centers, which may include routing from a DE Exchange to the Exchange. Following the Combination, it is expected that DE Route will continue to provide these routing services, which may involve routing to the Exchange. Because, following the Combination, DE Route will be affiliated with and potentially routing to the Exchange, the Exchange believes that the potential conflict of interest currently addressed by Exchange Rule 2.12 with respect to BATS Trading must also be addressed with respect to DE Route.

The Exchange is therefore proposing to amend and expand Exchange Rule 2.12 such that substantially the same conditions and limitations that currently apply to the inbound routing of orders by BATS Trading apply to the inbound routing of orders by DE Route. The proposed amendments to Exchange Rule 2.12, as set forth in Exhibit 5H, would provide that, in order for the Exchange to accept inbound routed orders from DE Route, the conditions and limitations currently set forth in Exchange Rule 2.12 with respect to BATS Trading must also be satisfied with respect to DE Route.

The Exchange believes that these proposed amendments will adequately manage the potential for a conflict of interest that could arise from DE Route routing orders to the Exchange. The Exchange expects to arrange that these conditions be met prior to the Closing so as to allow DE Route to continue routing to the Exchange following the Closing without interruption.[83]

In addition, the language in Exchange Rule 2.12 leading into the four conditions described above incorrectly refers to the conditions being undertaken by ''each of the Exchange and BATS Trading.'' However, by their terms, the conditions contained in Exchange Rule 2.12 are undertaken only by the Exchange and, in one case, the Exchange on behalf of its parent company. The Exchange therefore proposes to delete the incorrect reference to BATS Trading.

10. Exchange Rule 2.10—Affiliation With DE Route

Exchange Rule 2.10 provides that, subject to certain exceptions, without the prior approval of the Commission, (i) the Exchange or any entity with which the Exchange is affiliated (as defined in Rule 12b–2 under the Act), may not directly or indirectly acquire or maintain an ownership interest in a Member of the Exchange, and (ii) a Member of the Exchange may not be or become an affiliate of the Exchange, or an affiliate of any affiliate of the Exchange.

DE Route is currently a Member of the Exchange. As a result of the Combination, (i) New BGM, an entity affiliated with the Exchange, will acquire and maintain an indirect ownership interest in DE Route, and (ii) DE Route will become an affiliate of the Exchange. Pursuant to Exchange Rule 2.10, the Exchange is seeking the Commission's prior approval to permit this affiliation.

The Exchange notes that the purpose of Exchange Rule 2.10 is to prevent or manage potential conflicts of interest that could arise from the Exchange or its affiliates having an ownership interest in an Exchange Member, particularly with respect to the Exchange's obligation under Section 19(g) of the Act to enforce its Members' compliance with the Act, the Commission's rules thereunder, and Exchange Rules.[84]

The Exchange believes that it should be permitted to become affiliated with DE Route, notwithstanding DE Route's Exchange membership. As described above, as a result of the proposed amendments to Exchange Rule 2.12, the Exchange intends on addressing the potential conflicts of interests arising from its expected affiliation with DE Route by, among other things, entering into (i) a plan pursuant to Rule 17d-2 under the Act with a non-affiliated SRO to relieve the Exchange of regulatory responsibilities for DE Route with respect to rules that are common rules between the Exchange and the non-affiliated SRO, and (ii) a Regulatory Contract with a non-affiliated SRO to perform regulatory responsibilities for DE Route for unique Exchange rules. The Exchange believes that any potential conflict of interest that would arise as a result of its affiliation with DE Route will be mitigated by the same procedures that the Exchange anticipates adopting to satisfy the proposed amendments to Exchange Rule 2.12. The Exchange therefore requests that, pursuant to Exchange Rule 2.10, the Commission approve the indirect acquisition of DE Route by an affiliate of the Exchange and the resulting affiliation between the Exchange and DE Route, so long as the requirements under Exchange Rule 2.12, as proposed to be amended, are satisfied.

2. Statutory Basis

The Exchange believes that the Proposed Rule Change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[85] In particular, the proposal is consistent with Section 6(b)(1) of the Act[86] in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the Rules of the Exchange. The Proposed Rule Change is designed to enable the Exchange to continue to have the authority and ability to effectively fulfill its self-regulatory duties pursuant to the Act and the rules promulgated thereunder. In particular, the Proposed Rule Change includes in the New BGM Charter and New BGM Bylaws, like the Current BGM Charter and Current BGM Bylaws, various provisions intended to protect and maintain the integrity of the self-regulatory functions of the Exchange upon Closing. For example, the New BGM Bylaws, as described above, are drafted to preserve the independence of the Exchange's self-regulatory function and ensure that the Exchange is able to obtain information it needs from the specified parties to detect and deter any fraudulent and manipulative acts in its marketplace and carry out their regulatory responsibilities under the Act. In addition, the New BGM Charter and New BGM Bylaws are drafted to make sure that the Exchange's Board of Directors receives notice of any amendment to the New BGM Charter and New BGM Bylaws so that the Exchange's Board of Directors may review and approve, and the Exchange may make any filings with the Commission necessary for the Exchange to fulfill its regulatory duties under the Act. The New BGM Charter also imposes the BGM Ownership Limitation

[82] *See* Securities Exchange Act Release No. 66572 (March 12, 2012), 77 FR 15152 (March 14, 2012) (SR–BYX–2012–006).

[83] If such conditions and limitations are not satisfied by Closing, the Exchange will not accept inbound orders from DE Route until such conditions and limitations are satisfied.

[84] 15 U.S.C. 78s(g).

[85] 15 U.S.C. 78f(b).

[86] 15 U.S.C. 78f(b)(1).

and BGM Voting Limitation to preclude undue influence over or interference with the Exchange's self-regulatory functions and fulfillment of its regulatory duties under the Act.

Moreover, notwithstanding the Proposed Rule Change, including the change to the ownership structure of the Exchange, the Commission will continue to have regulatory authority over the Exchange, as is currently the case, as well as jurisdiction over the Exchange's direct and indirect parents with respect to activities related to the Exchange.[87] As a result, the Proposed Rule Change will facilitate an ownership structure that will provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Act with respect to the Exchange, its direct and indirect parent entities and their directors, officers, employees and agents to the extent they are involved in the activities of the Exchange.

The Exchange also believes that the Proposed Rule Change furthers the objectives of Section 6(b)(5) of the Act[88] because the Proposed Rule Change would be consistent with and facilitate a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

In addition, the Exchange expects that the Combination will facilitate efficiencies and innovation for clients and efficient, transparent and well-regulated markets for issuers and clients, thus removing impediments to, and perfecting the mechanism of a free and open market and a national market system. The Combination will benefit investors, the market as a whole, and shareholders by, among other things, enhancing competition among securities venues and reducing costs. In particular, the Combination will result in a third major exchange operator which will have more streamlined and efficient operations, including the transition of the DE Exchanges to a technology platform in common with the BATS Exchanges, thereby intensifying competition for transaction order flow with other exchange and non-exchange trading centers, as well as potentially in other areas where the two major exchange operators lead, such as proprietary market data products and listings. This enhanced level of competition among trading centers will benefit investors through new or more competitive product offerings and, ultimately, lower costs.

Furthermore, the Exchange is not proposing any significant changes to its existing operational and trading structure in connection with the change in ownership; the Exchange will operate in essentially the same manner upon Closing as it operates today. Therefore, the Exchange believes that it will continue to satisfy the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange. The changes the Exchange is proposing to Exchange Rules 2.3 are designed to extend the membership eligibility criteria in a way that is consistent with the current rule, taking into account the prospective affiliation with the DE Exchanges. The proposed change to Exchange Rule 2.12 is designed to address the potential for conflicts of interest due to the prospective affiliation between the Exchange and DE Route. The Exchange believes that the proposed change to its Rules is consistent with the requirements of the Act and the rules and regulations thereunder. The Exchange believes that the rule change promotes the maintenance of a fair and orderly market, the protection of investors and the public interest, and is in the best interests of the Exchange and its Members as it would continue to allow routing of orders between the four affiliated exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the Proposed Rule Change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Indeed, the Exchange believes that the Proposed Rule Change will enhance competition among intermarket trading venues, as the Exchange believes that the Combination will produce a stronger and more efficient entity that will have an improved ability to provide innovative products and services. Moreover, the Exchange will continue to conduct regulated activities (including operating and regulating its market and Members) of the type it currently conducts, but will be able to do so in a more efficient manner to the benefit of its Members. Furthermore, the Exchange's conclusion that the Proposed Rule Change would not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act is consistent with the Commission's prior conclusions about similar combinations involving multiple exchanges in a single corporate family.[89]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–BYX–2013–039 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

[87] *See, e.g.,* New BGM Bylaws, Section 14.05; BGM Holdings Bylaws, Section 7.3.

[88] 15 U.S.C. 78f(b)(5).

[89] *See, e.g.,* Securities Exchange Act Release No. 66071 (December 29, 2011), 77 FR 521 (January 05, 2012) (SR–CBOE–2011–107 and SR–NSX–2011–14); Securities Exchange Act Release No. 58324 (Aug. 7, 2008), 73 FR 46936 (August 12, 2008) (SR–BSE–2008–02; SR–BSE–2008–23; SR–BSE–2008–25; SR–BSECC–2008–01); Securities Exchange Act Release No. 53382 (Feb. 27, 2006), 71 FR 11251 (March 06, 2006) (SR–NYSE–2005–77).

All submissions should refer to File Number SR–BYX–2013–039. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BYX–2013–039, and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[90]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–29623 Filed 12–11–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71006; File No. SR–C2–2013–040]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Options Regulatory Fee

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 27, 2013, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') proposes to amend the Options Regulatory Fee. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has reevaluated the current amount of the Options Regulatory Fee (''ORF'') in connection with its annual budget review. In light of increased regulatory costs, including the hiring of many new regulatory employees, and expected volume levels for 2014, the Exchange proposes to increase the ORF from zero to $.0017 per contract. The proposed fee change would be operative on January 1, 2014.

The ORF is assessed by the Exchange to each Permit Holder for all options transactions executed or cleared by the Permit Holder that are cleared by The Options Clearing Corporation (''OCC'') in the customer range (i.e., transactions that clear in a customer account at OCC) regardless of the marketplace of execution. In other words, the Exchange imposes the ORF on all customer-range transactions executed by a Permit Holder, even if the transactions do not take place on the Exchange.[3] The ORF also is charged for transactions that are not executed by a Permit Holder but are ultimately cleared by a Permit Holder. In the case where a Permit Holder executes a transaction and a different Permit Holder clears the transaction, the ORF is assessed to the Permit Holder who executed the transaction. In the case where a non-Permit Holder executes a transaction and a Permit Holder clears the transaction, the ORF is assessed to the Permit Holder who clears the transaction. The ORF is collected indirectly from Permit Holders through their clearing firms by OCC on behalf of the Exchange.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of Permit Holder customer options business, including performing routine surveillances, investigations, examinations, financial monitoring, as well as policy, rulemaking, interpretive and enforcement activities. The Exchange believes that revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees and fines, will cover a material portion, but not all, of the Exchange's regulatory costs. The Exchange notes that its regulatory responsibilities with respect to Permit Holder compliance with options sales practice rules have largely been allocated to FINRA under a 17d–2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

The Exchange will monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission. The Exchange notifies Permit Holders of adjustments to the ORF via regulatory circular.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the

[90] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Exchange rules require each Permit Holder to record the appropriate account origin code on all orders at the time of entry in order to allow the Exchange to properly prioritize and route orders and assess transaction fees pursuant to the rules of the Exchange and report resulting transactions to the OCC. C2 order origin codes are defined in C2 Regulatory Circular RG13–015. The Exchange represents that it has surveillances in place to verify that Trading Permit Holders mark orders with the correct account origin code.

Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[4] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[5] which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its Permit Holders and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[6] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee change is reasonable because it would help the Exchange offset increased regulatory expenses, in particular the hiring of many new regulatory employees, but would not result in total regulatory revenue exceeding total regulatory costs. The Exchange believes the ORF is equitable and not unfairly discriminatory in that it is charged to all Permit Holders on all their transactions that clear in the customer range at the OCC. Moreover, the Exchange believes the ORF ensures fairness by assessing higher fees to those Permit Holders that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., Permit Holder proprietary transactions) of its regulatory program.[7]

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues. Rather, the proposed rule change is designed to help the Exchange to adequately fund its regulatory activities while seeking to ensure that total regulatory revenues do not exceed total regulatory costs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and paragraph (f) of Rule 19b–4[9] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2013–040 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2013–040. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–C2–2013–040 and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–29605 Filed 12–11–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71020; File No. SR–SCCP–2013–01]

Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Notice of Filing of Proposed Rule Change To Amend the Restated Certificate of Incorporation and By-Laws of The NASDAQ OMX Group, Inc.

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 27, 2013, the Stock Clearing Corporation of Philadelphia (''SCCP'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III, below, which Items have been

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[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] *Id.* [sic].

[7] If the Exchange changes its method of funding regulation or if circumstances otherwise change in the future, the Exchange may decide to modify the ORF or assess a separate regulatory fee on Permit Holder proprietary transactions if the Exchange deems it advisable.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f).

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

prepared by SCCP. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

SCCP is filing this proposed rule change with respect to amendments of the Restated Certificate of Incorporation (the ''Charter'') and By-Laws (the ''By-Laws'') of its parent corporation, The NASDAQ OMX Group, Inc. (''NASDAQ OMX'' or the ''Company''). The proposed amendments will be implemented on a date designated by NASDAQ OMX following approval by the Commission. The text of the proposed rule change is available on SCCP's Web site at *http://nasdaqomxphlx.cchwallstreet.com/nasdaqomxphlx/sccp/*, at the principal office of SCCP, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, SCCP included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. SCCP has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ OMX is proposing to make certain amendments to its Charter and By-Laws.

(i) Background

At NASDAQ OMX's 2012 annual meeting held on May 22, 2012, NASDAQ OMX's stockholders considered two proposals submitted by individual stockholders. The first proposal, which passed with 68% of the votes cast, requested that NASDAQ OMX's Board take steps to replace each supermajority voting standard in the Charter and By-Laws [3] with a voting standard requiring a ''majority of votes cast.'' The second proposal, which did not pass but received 49% of the votes cast, requested that NASDAQ OMX's Board take steps to enable stockholders having at least one-tenth of NASDAQ OMX's voting power to call a special meeting of stockholders.

Following the 2012 annual meeting, the Nominating & Governance Committee of NASDAQ OMX's Board reviewed the voting results on the two stockholder proposals and discussed the stockholder voting standards and rights contemplated by the Charter and By-Laws. Following this review, the Nominating & Governance Committee recommended to the Board, and the Board approved, certain changes to the Charter and By-Laws to address the two stockholder proposals and make other changes. NASDAQ OMX now proposes to make these changes, which are described further below.

(ii) Proposed Amendments to Charter

(a) Removal and Replacement of Supermajority Voting Requirements

To respond to feedback from its stockholders, NASDAQ OMX proposes to replace each supermajority voting requirement in the Charter with a ''majority of outstanding shares'' voting requirement. The Charter currently includes the following three supermajority voting requirements.

• *Removal of Directors.* Article Fifth, Paragraph D provides that, except for directors elected by the holders of any series of preferred stock, any director, or the entire Board, may be removed from office at any time, but only by the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors (the ''Voting Stock''), voting together as a single class.

• *Adoption, Alteration, Amendment and Repeal of By-Laws.* Article Eighth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the total voting power of the outstanding Voting Stock, voting together as a single class, shall be required in order for the stockholders to adopt, alter, amend or repeal any By-Law.

• *Adoption, Alteration, Amendment and Repeal of Certain Charter Provisions.* Article Ninth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the voting power of the outstanding Voting Stock, voting together as a single class, shall be required to amend, repeal or adopt any provision inconsistent with paragraph C of Article Fourth,[4] Article Fifth,[5] Article Seventh,[6] Article Eighth [7] or Article Ninth of the Charter.[8]

In each of the three provisions described above, NASDAQ OMX proposes to remove the requirement for an affirmative vote of at least 66⅔% of the total voting power of the Voting Stock and replace it with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock. In developing this proposal, NASDAQ OMX considered the relative weight of the arguments for and against supermajority voting requirements. Historically, supermajority voting requirements have protected corporations against coercive takeover tactics by requiring broad stockholder support for certain types of transactions or governance changes. However, in recent years, corporate governance standards have evolved, and many stockholder rights advocates argue that supermajority voting requirements limit stockholders' participation in corporate governance. NASDAQ OMX believes that while it is important to protect against coercive takeover tactics, it is also critically important to obtain stockholder input and respond to stockholder concerns about corporate governance.

NASDAQ OMX believes that the proposed ''majority of outstanding shares'' voting requirement will continue to provide some protection against proposals that are harmful to the stockholders. While this requirement is less difficult to satisfy than a supermajority voting requirement, it is more difficult to satisfy than a ''majority of votes cast'' requirement, which NASDAQ OMX considered as an alternate option. NASDAQ OMX believes that a ''majority of outstanding shares'' standard is a balanced outcome that responds to stockholder feedback while appropriately maintaining

[3] These provisions, which are described further below, require the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock to approve certain actions.

[4] Paragraph C of Article Fourth sets forth the 5% voting limitation, which provides that holders of NASDAQ OMX's voting securities may not cast votes in excess of 5% of NASDAQ OMX's outstanding voting securities. To be clear, NASDAQ OMX is not proposing any change to the 5% voting limitation itself. NASDAQ OMX only proposes that any future amendment of the 5% voting limitation will require the approval of stockholders holding a majority of the outstanding shares, rather than stockholders holding 66⅔% of the outstanding shares.

[5] Article Fifth includes certain provisions relating to the Board, such as Board size and director elections.

[6] Article Seventh prohibits stockholder action by written consent.

[7] Article Eighth establishes the procedures to adopt, alter, amend or repeal the By-Laws.

[8] Article Ninth establishes the procedures to adopt, alter, amend or repeal the Charter.

NASDAQ OMX's defensive posture against hostile takeovers.

(b) Non-Substantive Changes

NASDAQ OMX also proposes to amend and restate the Charter to make other non-substantive changes. Specifically, the proposal deletes obsolete references to the following:

- The 3.75% Series A Convertible Notes due 2012 and the 3.75% Series B Convertible Notes due 2012, which are no longer outstanding, in Article Fourth, Paragraph C and Article Eleventh;
- a voting trust agreement, which is no longer in effect, in Article Fourth, Paragraph C(3)(b)(iii);
- ownership of NASDAQ OMX securities by the National Association of Securities Dealers, Inc., certain affiliates of Hellman & Friedman LLC, and certain affiliates of Silver Lake, none of which currently own any NASDAQ OMX securities, in Article Fourth, Paragraph C(6); [9] and
- the phase-out of the classified board structure, which was complete in 2007, in Article Fifth, Paragraph B.

In Article Fifth, Paragraph B, the proposal also clarifies that the election of directors by stockholders shall occur at an annual or special meeting. The proposal corrects a typographical error in Article Fifth, Paragraph A and renumbers the provisions of the Charter, where necessary following the other amendments. Finally, the proposal amends the introductory and concluding language of the Charter to incorporate language that will be required under Delaware law when the amended and restated Charter is filed with the Secretary of State of the State of Delaware.[10]

The amendment and restatement of the Charter to incorporate these non-substantive changes will simplify and streamline the document.

(iii) Proposed Elimination of Certificate of Designation

NASDAQ OMX proposes to eliminate its Certificate of Designation, Preferences and Rights of Series A Convertible Preferred Stock (the ''Series A Convertible Preferred Stock''), and all matters set forth therein. The Series A Convertible Preferred Stock was created in 2009 to facilitate the conversion of certain notes into common stock.[11] The Company authorized 2 million shares of the Series A Convertible Preferred Stock and immediately issued 1.6 million of those shares to the converting noteholders.

In 2010, following stockholder approval, all 1.6 million issued shares of the Series A Convertible Preferred Stock were converted into common stock. Since then, no shares of the Series A Convertible Preferred Stock have been outstanding, and the Company has no intention to issue further shares of this series.

As a clean-up matter, the Company seeks to file a certificate of elimination with the Secretary of State of the State of Delaware to eliminate the Series A Convertible Preferred Stock. Under Delaware law, a certificate of elimination is deemed to be an amendment to NASDAQ OMX's Charter; however, since the amendment is limited in scope, it does not require the approval of NASDAQ OMX's stockholders.[12]

(iv) Proposed Amendments to the By-Laws

(a) Special Meetings of Stockholders

Current Section 3.2 of NASDAQ OMX's By-Laws provides that only NASDAQ OMX may call special meetings of its stockholders.[13] To respond to feedback from its stockholders, as discussed above, NASDAQ OMX proposes to delete this provision and replace it with language that will allow NASDAQ OMX's stockholders to call special meetings after following particular procedures. Similar to the elimination of supermajority voting requirements, which is discussed above, the implementation of the right of stockholders to call a special meeting has received recent attention from investor and corporate governance advocates. These advocates argue that such a right will enable stockholders to raise and act on matters that arise between annual meetings.

Following discussions with some of its stockholders, NASDAQ OMX agrees that it is appropriate to allow stockholders who meet certain procedural requirements to call a special meeting. In proposing these procedural requirements, NASDAQ OMX's goals are to ensure timely notice of a meeting request and to gather sufficient information about the proposing stockholder(s) and the proposal. Among other things, this information will ensure that NASDAQ OMX is able to comply with its disclosure and other requirements under applicable law and that NASDAQ OMX, its Board and its stockholders are able to assess the proposal adequately. The proposed procedural requirements are set forth below.

First, proposed Section 3.2(a) provides that special meetings of NASDAQ OMX's stockholders may only be called: (i) At any time by NASDAQ OMX's Board pursuant to a resolution adopted by a majority of the total number of directors NASDAQ OMX would have if there were no vacancies; and (ii) by NASDAQ OMX's Corporate Secretary following the receipt of a written request in proper form for a special meeting (a ''Special Meeting Request'') by one or more stockholders. Such stockholders (the ''Requisite

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[9] NASDAQ OMX notes that the remaining text of Article Fourth, Paragraph C(6) of the Charter includes an obsolete cross-reference to Section 6(b) of Article Fourth, Paragraph C in the second sentence, which begins ''The Board, however, may not approve an exemption under Section 6(b) . . .'' NASDAQ OMX cannot correct this cross-reference, which should refer to Section 6 without further reference to a subsection (b), without seeking further approval of its stockholders, which would require NASDAQ OMX to call and hold a stockholder meeting. Generally, NASDAQ OMX holds stockholder meetings, which are time consuming and expensive, only once or twice a year. Moreover, it is atypical of a large public company like NASDAQ OMX to submit a proposal to its stockholders solely to correct a cross-reference in its Charter. However, NASDAQ OMX believes, following consultation with outside counsel, that it is clear, based on the drafting history of this provision, that the intent of the cross-reference is to refer to Section 6 of Article Fourth, Paragraph C of the Charter. In other words, the second sentence of Article Fourth, Paragraph C(6) should read: ''The Board, however, may not approve an exemption under Section 6: (i) For a registered broker or dealer or an Affiliate thereof or (ii) an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act.'' Under no circumstances will NASDAQ OMX read the obsolete cross-reference to imply that the Board could grant an exemption to the ownership limitation in Article Fourth, Paragraph C(6) of the Charter for a registered broker or dealer or an Affiliate thereof, or an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act. NASDAQ OMX also notes that it is proposing amendments to Section 12.5 of the By-Laws to eliminate cross-references to subsection (b) of Article Fourth, Paragraph C(6) of the Charter. Finally, NASDAQ OMX notes that there are some differences in language between the second sentence of Article Fourth, Paragraph C(6) of the Charter and the second sentence of Section 12.5 of the By-Laws. To the extent that these differences would cause a difference in interpretation, NASDAQ OMX notes, following consultation with outside counsel, that the Charter language shall prevail. As soon as feasible, NASDAQ OMX plans to present a proposal to the stockholders to conform this provision of the Charter to the By-Laws.

[10] *See* Sections 242 and 245 of the DGCL.

[11] *See* Securities Exchange Act Release No. 60845 (October 20, 2009), 74 FR 55078 (October 26, 2009) (SR–BX–2009–061, SR–NASDAQ–2009–087, SR–Phlx–2009–88); *see also* Securities Exchange Act Release No. 61000 (November 13, 2009), 74 FR 61390 (November 24, 2009) (SR–BSECC–2009–005); *see also* Securities Exchange Act Release No. 61001 (November 13, 2009), 74 FR 61391 (November 24, 2009) (SR–SCCP–2009–04).

[12] *See* Section 151(g) of the DGCL.

[13] Under Delaware law, special meetings of a corporation's stockholders may be called by the board of directors or by such persons as may be authorized by the certificate of incorporation or the bylaws. *See* Section 211(d) of the DGCL.

Holders'') must hold of record, in the aggregate, at least 15 percent of NASDAQ OMX's outstanding shares of capital stock entitled to vote on matters to be brought before the special meeting (the ''Requisite Percentage''). Such shares must be ''Net Long Shares,'' [14] and the Requisite Holders must have held the shares continuously for at least one year as of the date of the Special Meeting Request. Whether shares constitute Net Long Shares shall ultimately be decided by NASDAQ OMX's Board in its reasonable determination. The intent of the requirement for stockholders to maintain a ''net long position'' is to limit the ability to call a special meeting to stockholders that have long-term record and economic positions in NASDAQ OMX.

Proposed Section 3.2(a) also sets forth the procedures for determining whether a special meeting has been requested by Requisite Holders representing in aggregate at least the Requisite Percentage if multiple Special Meeting Requests are delivered to NASDAQ OMX's Corporate Secretary. Multiple requests will be considered together only if: (i) Each Special Meeting Request identifies substantially the same purpose or purposes of the special meeting and substantially the same matters proposed to be acted on at the requested special meeting (in each case as determined in good faith by NASDAQ OMX's Board); and (ii) such Special Meeting Requests have been dated and delivered to NASDAQ OMX's Corporate Secretary within 60 days of the earliest dated Special Meeting Request. NASDAQ OMX believes these procedures are reasonable and clear and notes that they grant only limited discretion to NASDAQ OMX's Board in determining whether Special Meeting Requests will be considered together.

Pursuant to proposed Section 3.2(b), if a Special Meeting Request is in proper form, NASDAQ OMX's Board shall determine the place, if any, date and time of the special meeting, and NASDAQ OMX's Corporate Secretary shall call the special meeting within 120 days after the date the Special Meeting Request was delivered. However, NASDAQ OMX's Board may, in lieu of calling a special meeting, present an identical or substantially similar item of business (a ''Similar Item''),[15] as determined in good faith by NASDAQ OMX's Board, for stockholder approval at any other meeting of the stockholders that is held not less than 120 days after the delivery of the Special Meeting Request. The intent of this provision is to save NASDAQ OMX the time and expense of calling and holding a special meeting if NASDAQ OMX intends to hold a separate stockholders' meeting within 120 days. In fixing the place, if any, date and time for any special meeting, NASDAQ OMX's Board may consider such factors as it deems relevant in its business judgment, including the nature of the matters to be considered, the facts and circumstances surrounding any request for a meeting and any plan of the Board to call an annual meeting or a special meeting.

Proposed Section 3.2(c) sets forth certain limitations on Special Meeting Requests. Specifically, a Special Meeting Request will not be valid if:

- It relates to an item of business that is not a proper subject for stockholder action under applicable law;
- it is delivered during the period commencing 90 days prior to the one-year anniversary of the date of the immediately preceding annual meeting and ending on the date of the next annual meeting;
- a Similar Item was presented at any meeting of stockholders held within 120 days prior to the date on which the Special Meeting Request was delivered; or
- a Similar Item is included in NASDAQ OMX's notice of meeting as an item of business to be presented at a stockholder's meeting that has been called but not yet held.

The Board may adjourn or reschedule any previously scheduled special meeting of the stockholders. NASDAQ OMX believes the subject matter limitations set forth in proposed Section 3.2(c) are appropriate in order to comply with applicable law and to prevent multiple considerations of the same item of business. NASDAQ OMX believes the time limits set forth in proposed Section 3.2(c) are appropriate to ensure that NASDAQ OMX is not required to incur the time and expense of calling and holding a special meeting of stockholders immediately prior to an upcoming annual meeting of stockholders or if a Similar Item of business already has been presented at a recent stockholders' meeting.

To be in proper form, a Special Meeting Request must comply with certain requirements, as described further below.[16] NASDAQ OMX's Board will have the sole discretion to determine whether a Special Meeting Request is in proper form.[17] Proposed Section 3.2(d) sets forth the requirements for a Special Meeting Request to be in proper form. These proposed requirements will ensure that NASDAQ OMX has sufficient information to comply with its disclosure requirements under applicable law and that the Requisite Holders maintain a sufficient ownership level through the date of the special meeting. Specifically, a Special Meeting Request shall:

- Be in writing, signed by each Requesting Person [18] and delivered to NASDAQ OMX's Corporate Secretary at NASDAQ OMX's principal executive offices;
- set forth certain information with respect to (i) each person the Requesting Person proposes to nominate for director, (ii) any business the Requesting Person proposes to bring before the meeting and (iii) each Requesting Person; [19] and
- include (i) an agreement by each Requisite Holder to immediately deliver written notice to NASDAQ OMX's

[14] For purposes of determining Requisite Holders under proposed Section 3.2, ''Net Long Shares'' shall be limited to the number of shares beneficially owned, directly or indirectly, by any stockholder or beneficial owner that constitute such person's ''net long position'' as defined in Rule 14e–4 under the Act, provided that (A) for the purposes of this definition, references in the rule to ''the date the tender offer is first publicly announced or otherwise made known by the bidder to the holders of the security to be acquired'' shall be the date of the relevant Special Meeting Request and all dates in the one year period prior thereto, the ''highest tender offer price or stated amount of the consideration offered for the subject security'' shall refer to the closing sales price of NASDAQ OMX's capital stock on NASDAQ on such date (or, if such date is not a trading day, the next succeeding trading day), the ''person whose securities are the subject of the offer'' shall refer to NASDAQ OMX, a ''subject security'' shall refer to the issued and outstanding voting stock of NASDAQ OMX; and (B) the net long position of such stockholder shall be reduced by any shares as to which such person does not have the right to vote or direct the vote at the proposed special meeting or as to which such person has entered into a derivative or other agreement, arrangement or understanding that hedges or transfers, in whole or in part, directly or indirectly, any of the economic consequences of ownership of such shares. In addition, to the extent any affiliates of the stockholder or beneficial owner are acting in concert with the stockholder or beneficial owner with respect to the calling of the special meeting, the determination of Net Long Shares may include the effect of aggregating the Net Long Shares (including any negative number) of such affiliate or affiliates. *See* proposed Section 3.2(a) of the By-Laws.

[15] Under proposed Section 3.2(b) of the By-Laws, the election of directors shall be deemed a ''Similar Item'' with respect to all items of business involving the nomination, election or removal of directors.

[16] *See* proposed Section 3.2(a) of the By-Laws.

[17] *Id.*

[18] ''Requesting Person'' means (i) each Requisite Holder, (ii) the beneficial owner or beneficial owners, if different, on whose behalf the Special Meeting Request is being delivered to NASDAQ OMX's Corporate Secretary and (iii) any affiliate or associate of such stockholder or beneficial owner. *See* proposed Section 3.2(e) of the By-Laws.

[19] The information required is the same information required from Proposing Persons with respect to nominations or items of business to be brought before an annual meeting of stockholders and is described in detail in Section (iv)(b) below.

Corporate Secretary in the case of any disposition, on or prior to the record date for the special meeting, of any shares of NASDAQ OMX's capital stock held of record by such Requisite Holder and (ii) an acknowledgement that (1) any such disposition shall be deemed a revocation of the Special Meeting Request to the extent of such disposition and (2) if, following such deemed revocation, the Requisite Holders hold of record, in the aggregate, less than the Requisite Percentage of the voting power of all outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors, NASDAQ OMX shall have no obligation to hold the special meeting.

Proposed Section 3.2(f) provides that at any special meeting of the stockholders, the only business to be conducted or considered will have been specified in the notice of meeting (or any supplement thereto) given by or at the direction of NASDAQ OMX's Board or Corporate Secretary, as the case may be. In any event, however, NASDAQ OMX's Board may submit its own proposal or proposals for consideration at a special meeting. Except as otherwise allowed under proposed Section 3.2, stockholders will not be permitted to propose business to be brought before a special meeting of the stockholders. NASDAQ OMX believes these provisions are reasonable and necessary to limit the items of business that may be considered at a special meeting to those that were proposed by the Company, the Board or stockholders that comply with the requirements and procedures set forth in the By-Laws.

Proposed Section 3.2(g) will require the Requisite Holders giving a Special Meeting Request to further update and supplement the request, if necessary, so that the information in the request is true and correct as of the record date for the special meeting and as of the 10th business day prior to the special meeting or any adjournment or postponement thereof. This requirement will ensure that NASDAQ OMX, its Board and its other stockholders are notified of changes to the information they will consider in assessing a proposed item of business prior to the special meeting. In the case of an update and supplement required to be made as of the record date, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the fifth business day after the record date for the special meeting. In the case of an update and supplement required to be made as of the 10th business day prior to the special meeting or any adjournment or postponement thereof, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the eighth business day prior to the date for the special meeting or, if practical, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the special meeting has been adjourned or postponed).

Proposed Section 3.2(h) will allow the Requisite Holders to revoke a Special Meeting Request by written revocation delivered to NASDAQ OMX at any time prior to the special meeting requested. However, NASDAQ OMX's Board will have the discretion to determine whether or not to proceed with the special meeting. The Board might wish to continue with the special meeting if, for example, the Company has already spent the time and expense required to call the meeting or if the agenda for the meeting includes items other than those proposed in the Special Meeting Request.

Finally, NASDAQ OMX proposes to designate as Section 3.2(i) existing text that sets forth the requirements for stockholders to submit nominees for election as directors at certain stockholder meetings. NASDAQ OMX further proposes to make a minor change to this text to clarify that NASDAQ OMX's Board, rather than the Company itself, will call a special meeting on behalf of the Company.

(b) Annual Meetings of Stockholders

Section 3.1 of NASDAQ OMX's By-Laws, which is the ''advance notice'' provision,[20] requires stockholders to notify NASDAQ OMX, during a specified period in advance of an annual meeting, of their intention to nominate one or more persons for election to the Board or to present a business proposal for consideration by the stockholders at the meeting. While designing the proposed procedural requirements for stockholders to call a special meeting, as outlined above, NASDAQ OMX evaluated the existing procedural requirements for stockholders to bring business before an annual meeting. NASDAQ OMX is therefore proposing changes to some of these procedures to enhance them and conform them, in some cases, to the procedures relating to special meetings. Generally, the proposed amendments add requirements for extensive disclosures by proposing stockholders about themselves, any proposed nominees for director and any proposed items of business to be brought before a meeting. The specific amendments are discussed in detail below.

First, Section 3.1(a) of the By-Laws currently states that nominations of persons for election to NASDAQ OMX's Board and the proposal of other business to be considered by the stockholders at an annual meeting of stockholders may be made only: (i) Pursuant to the Company's notice of meeting (or any supplement thereto); (ii) by or at the direction of NASDAQ OMX's Board or its Nominating & Governance Committee; or (iii) by any stockholder of the Company that meets certain requirements. These requirements state that the stockholder must: (i) Be a stockholder of record at the time of delivery of notice to the Company of nominees or other business to be conducted at the meeting; (ii) be entitled to vote at the meeting; and (iii) comply with the notice procedures set forth in the By-Laws. NASDAQ OMX proposes to add a parenthetical to the requirement that a stockholder must be a stockholder of record to clarify that a nomination or proposal of other business may be made on behalf of a beneficial owner, if different from the stockholder of record, only if the beneficial owner is the beneficial owner of NASDAQ OMX shares. This modification will clarify that both record and beneficial owners of NASDAQ OMX stock have the right to propose nominees or business to be considered at an annual meeting. NASDAQ OMX further proposes that a stockholder who proposes nominees or business to be considered at an annual meeting must hold shares in the Company at the time of the meeting, in addition to the time of delivery of the required notice to the Company. This will ensure that a stockholder retains an interest in the Company until the meeting at which the stockholder's nominee or other business is considered. Finally, NASDAQ OMX proposes to number the procedural requirements for stockholders who propose nominees or business to make them easier to understand.

Currently, Section 3.1(b) of the By-Laws sets forth the requirements for a stockholder's notice to NASDAQ OMX of nominations or other business to be considered at an annual meeting. NASDAQ OMX proposes certain amendments to this section to ensure that NASDAQ OMX has sufficient information about such nominations or

[20] ''Advance notice'' provisions allow stockholder(s) to bring business before an annual meeting of stockholders, but set forth procedural requirements to ensure that companies and boards have sufficient information about the proposal and the proposing stockholder(s), as well as adequate time to consider the proposal, by requiring the proposing stockholder(s) to give advance notice of the intention to bring the proposal before the annual meeting.

other business proposed by a stockholder to enable the Company, the Board and the other stockholders to assess a position on the nominations or other business. The additional information requirements will also ensure that NASDAQ OMX can make adequate disclosures to its stockholders and comply with requirements under applicable law.

Specifically, NASDAQ OMX proposes an amendment to the first paragraph of this section to require a stockholder who provides a notice relating to a nomination to include with the notice, a completed and signed questionnaire, representation and agreement relating to the nominee(s) for director.[21] NASDAQ OMX also proposes to require a stockholder who provides a notice to further update and supplement the notice, if necessary, so that the information in the notice is true and correct as of the record date for the annual meeting and as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof.[22] This requirement will ensure that NASDAQ OMX, its Board and its other stockholders are notified of changes to the information they will consider in assessing a proposed item of business prior to the annual meeting. In the case of an update and supplement required to be made as of the record date, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the fifth business day after the record date for the annual meeting. In the case of an update and supplement required to be made as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the eighth business day prior to the date for the annual meeting or, if practicable, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the annual meeting has been adjourned or postponed).

Section 3.1(b)(i) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ OMX about each person whom the stockholder proposes to nominate for election as a director. NASDAQ OMX proposes changes to this section to use the defined term ''Proposing Person'' instead of stockholder,[23] to require information with respect to nominees for reelection as well as nominees for election, to correct a reference to the Act and to add numbering and other organizational changes to make the requirements easier to read and understand. NASDAQ OMX also proposes to require the same information with respect to a proposed nominee that will be required with respect to a Proposing Person, as discussed further below. In addition, NASDAQ OMX proposes to add two new informational requirements for proposed nominees, including:

- A description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships, between or among any Proposing Person, on the one hand, and such proposed nominee and any of his or her respective affiliates and associates, on the other hand, including, without limitation, all information that would be required to be disclosed pursuant to Item 404 under Regulation S–K if such Requesting Person were the ''registrant'' for purposes of such rule and the proposed nominee were a director or executive officer of such registrant; and
- a completed and signed questionnaire, representation and agreement.[24]

Finally, NASDAQ OMX proposes to add a catch-all provision to Section 3.1(b)(i) of the By-Laws that will allow the Company to require any proposed nominee to furnish such other information (i) as the Company may reasonably require to determine the eligibility of such proposed nominee to serve as a director or (ii) that could be material to a reasonable stockholder's understanding of the independence, or lack of independence, of such proposed nominee. NASDAQ OMX believes that all of the new information requirements included in proposed Section 3.1(b)(i) are reasonable and necessary in order to assist the Company in evaluating director eligibility, independence and potential conflicts of interest.

Section 3.1(b)(ii) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ OMX about any business, other than nominations for director, that the stockholder proposes to bring before an annual meeting. NASDAQ OMX proposes changes to this section to require that the description of the proposed business be reasonably detailed, to use the defined term ''Proposing Person'' instead of stockholder and beneficial owner in certain places and to add numbering, reordering and other organizational changes to make the requirements easier to read and understand. NASDAQ OMX also proposes to add a new requirement for a stockholder to provide a reasonably detailed description of all contracts, agreements, arrangements and understandings between or among any of the Proposing Persons or between or among any Proposing Person in connection with the proposal. NASDAQ OMX believes this information will be useful in assessing the aims and incentives of Proposing Persons in proposing business before an annual meeting.

Section 3.1(b)(iii) of the By-Laws currently sets forth the information that a stockholder who proposes nominee(s) for director or other business to be put forth before an annual meeting must provide to NASDAQ OMX about such stockholder and the beneficial owner, if any, on whose behalf the nomination or proposal is made. NASDAQ OMX proposes changes to this section to use the defined term ''Proposing Person'' instead of stockholder and beneficial owner in certain places and to add numbering, reordering and other organizational changes to make the requirements easier to read and understand.

Relating to the existing requirement in Section 3.1(b)(iii)(B) that a proposing stockholder describe the class or series and number of shares of NASDAQ OMX capital stock owned beneficially and of record by such stockholder and the beneficial owner, NASDAQ OMX proposes to add a parenthetical stating that beneficial ownership shall be determined within the meaning of Rule 13d-3 under the Act. NASDAQ OMX also proposes to state that a Proposing Person shall in all events be deemed to beneficially own any shares of any class or series of NASDAQ OMX's capital stock as to which such person has a right to acquire beneficial ownership at any time in the future. These proposed

[21] The contents of and rationale for the questionnaire, representation and agreement are discussed further in Section (iv)(c) below.

[22] NASDAQ OMX notes that this proposal is similar to proposed Section 3.2(g) of the By-Laws, which requires updates and supplements to a stockholder notice relating to a special meeting. This proposed change is discussed further in Section (iv)(a) above.

[23] ''Proposing Person'' means (i) the stockholder providing the notice of business or the notice of the nomination, as applicable, proposed to be brought before an annual meeting, (ii) any beneficial owner or beneficial owners, if different, on whose behalf such business is proposed to be brought before the meeting or the notice of the nomination proposed to be made at the meeting is made, as applicable, and (iii) any affiliate or associate (each within the meaning of Rule 12b–2 under the Act for purposes of the By-Laws) of such stockholder or beneficial owner. *See* proposed Section 3.1(c) of the By-Laws.

[24] The contents of and rationale for the questionnaire, representation and agreement are discussed further in Section (iv)(c) below.

changes merely clarify how the concept of beneficial ownership will be interpreted under this section of the By-Laws.

Current Section 3.1(b)(iii)(D) requires proposing stockholders to describe to NASDAQ OMX any agreement, arrangement or understanding (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares) that has been entered into as of the date of the notice by the stockholder and the beneficial owners with respect to NASDAQ OMX's stock. Given the increased complexity of such transactions in today's marketplace, NASDAQ OMX proposes to replace the current language with a similar requirement for disclosure of any Synthetic Equity Interest,[25] without regard to whether: (i) The derivative, swap or other transaction or series of transactions conveys any voting rights in such shares to the Proposing Person; (ii) the derivative, swap or other transaction or series of transactions is required to be, or is capable of being, settled through delivery of such shares; or (iii) the Proposing Person may have entered into other transactions that hedge or mitigate the economic effect of such derivative, swap or other transaction or series of transactions. This proposed provision will assist NASDAQ OMX, its Board and its other stockholders in understanding a Proposing Person's full economic interests in NASDAQ OMX and possible aims and incentives in submitting the proposed business for consideration at an annual meeting.

For this same reason, NASDAQ OMX also proposes to add several new disclosures that a Proposing Person must include in a notice to NASDAQ OMX regarding nominees or other business to be conducted at an annual meeting. These include disclosures regarding:

- any proxy (other than a revocable proxy or consent given in response to a solicitation made pursuant to, and in accordance with, Section 14(a) of the Act by way of a solicitation statement filed on Schedule 14A), agreement, arrangement, understanding or relationship pursuant to which the Proposing Person has or shares a right to vote any shares of any class or series of NASDAQ OMX;[26]
- any proportionate interest in NASDAQ OMX shares or Synthetic Equity Interest held, directly or indirectly, by a general or limited partnership in which the Proposing Person is a general partner or, directly or indirectly, beneficially owns an interest in a general partner;[27]
- any agreement, arrangement, understanding or relationship, including any repurchase or similar so-called ''stock borrowing'' agreement or arrangement, entered into or engaged in, directly or indirectly, by the Proposing Person, the purpose or effect of which is to mitigate loss to, reduce the economic risk (of ownership or otherwise) of shares of any class or series of NASDAQ OMX by, manage the risk of share price changes for, or increase or decrease the voting power of, the Proposing Person with respect to shares of any class or series of NASDAQ OMX, or that provides, directly or indirectly, the opportunity to profit from any decrease in the price or value of shares of any class or series of NASDAQ OMX (any of the foregoing, a ''Short Interest'');[28]
- any performance-related fees (other than an asset-based fee) to which the Proposing Person is entitled based on any increase or decrease in the price or value of shares of any class or series of NASDAQ OMX, or any Synthetic Equity Interest or Short Interest;[29]
- any significant equity interest or any Synthetic Equity Interest or Short Interest in any principal competitor of NASDAQ OMX held by the Proposing Person;[30]
- any direct or indirect interest of the Proposing Person in any contract with NASDAQ OMX, any affiliate of NASDAQ OMX or any principal competitor of NASDAQ OMX (including, in any such case, any employment agreement, collective bargaining agreement or consulting agreement);[31]
- any pending or threatened litigation in which the Proposing Person is a party or material participant involving NASDAQ OMX or any of its officers or directors, or any affiliate of NASDAQ OMX;[32]
- any material transaction occurring, in whole or in part, during the then immediately preceding 12-month period between such Proposing Person, on the one hand, and NASDAQ OMX, any affiliate of NASDAQ OMX or any principal competitor of NASDAQ OMX, on the other hand;[33] and
- any other information relating to the Proposing Person required to be disclosed in a proxy statement or other filings required to be made in connection with solicitations of proxies for, as applicable, the proposal and/or for the election of directors in an election contest pursuant to and in accordance with Section 14(a) of the Act and the rules and regulations promulgated thereunder.[34]

(c) Questionnaire, Representation and Agreement for Director-Nominees

NASDAQ OMX proposes to add a new Section 3.5 to its By-Laws to require nominees for director to deliver to NASDAQ OMX, in accordance with the time periods prescribed for delivery of a stockholder's notice: (i) A written questionnaire with respect to the background and qualifications of the nominee; and (ii) a written representation and agreement as to certain matters. Specifically, the written representation and agreement will provide that the nominee:

- is not and will not become a party to (i) any agreement as to how the nominee will act or vote on any issue or question (a ''Voting Commitment'') that has not been fully disclosed to NASDAQ OMX or (ii) any Voting Commitment that could limit or interfere with the nominee's fiduciary duties under applicable law;
- is not and will not become a party to any agreement with any person other than NASDAQ OMX with respect to any

[25] ''Synthetic Equity Interest'' shall mean any derivative, swap or other transaction (including any short positions, profit interest, options, warrants, convertible securities, stock appreciation or similar rights) or series of transactions engaged in, directly or indirectly, by a Proposing Person, the purpose or effect of which is to give the Proposing Person economic risk similar to ownership of shares of any class or series of NASDAQ OMX, including due to the fact that the value of such derivative, swap or other transaction or series of transactions is determined by reference to the price, value or volatility of any shares of any class or series of NASDAQ OMX, or which derivative, swap or other transaction or series of transactions provides, directly or indirectly, the opportunity to profit from any increase in the price or value of shares of any class or series of NASDAQ OMX. *See* proposed Section 3.1(b)(iii)(D) of the By-Laws.

[26] *See* proposed Section 3.1(b)(iii)(E) of the By-Laws.

[27] *See* proposed Section 3.1(b)(iii)(F) of the By-Laws.

[28] *See* proposed Section 3.1(b)(iii)(G) of the By-Laws.

[29] *See* proposed Section 3.1(b)(iii)(H) of the By-Laws.

[30] *See* proposed Section 3.1(b)(iii)(I) of the By-Laws.

[31] *See* proposed Section 3.1(b)(iii)(J) of the By-Laws.

[32] *See* proposed Section 3.1(b)(iii)(K) of the By-Laws.

[33] *See* proposed Section 3.1(b)(iii)(L) of the By-Laws.

[34] *See* proposed Section 3.1(b)(iii)(M) of the By-Laws. NASDAQ OMX also proposes to include an exception to each of the aforementioned disclosure requirements for any disclosures with respect to the ordinary course business activities of any broker, dealer, commercial bank, trust company or other nominee who is a Proposing Person solely as a result of being the stockholder directed to prepare and submit the notice required by the By-Laws on behalf of a beneficial owner.

direct or indirect compensation, reimbursement or indemnification in connection with service or action as a director of NASDAQ OMX that has not been fully disclosed to NASDAQ OMX;

• would be in compliance, if elected, and will comply, with the provisions of NASDAQ OMX's By-Laws relating to qualifications of directors, conflicts of interest and contracts and transactions involving directors; and

• in such proposed nominee's individual capacity and on behalf of any person on whose behalf the nomination is made, would be in compliance, if elected, and will comply, with NASDAQ OMX's Corporate Governance Guidelines, Board of Director Code of Conduct and Code of Ethics, including all applicable, publicly disclosed conflict of interest, confidentiality, stock ownership and insider trading policies and guidelines.

The requirements of proposed Section 3.5 of the By-Laws, which will apply to both the Company's and stockholders' nominees for director, will ensure that NASDAQ OMX has the necessary information about nominees to fulfill its public disclosure requirements. The requirements also will ensure that nominees will comply with the legal obligations, policies and procedures applicable to all NASDAQ OMX directors.

(d) Removal and Replacement of Supermajority Voting Provisions

Consistent with the proposed amendments to remove and replace the supermajority voting provisions in the Charter discussed above, NASDAQ OMX proposes to amend each provision of the By-Laws that currently requires a supermajority vote of stockholders to instead require a ''majority of votes outstanding.'' NASDAQ OMX's By-Laws currently include the following two supermajority voting requirements, each of which conforms with an analogous provision in the Charter.

• *Removal of Directors.* Section 4.6 provides that any or all of the directors may be removed from office at any time by the affirmative vote of at least 66⅔% of the total voting power of the Voting Stock, voting together as a single class.[35]

• *Adoption, Alteration, Amendment and Repeal of By-Laws.* Section 11.1 provides that the By-Laws may be altered amended or repealed, or new By-Laws may be adopted, at any meeting of the stockholders by the affirmative vote of the holders of at least 66⅔% of the voting power of the Voting Stock, voting together as a single class.[36]

To conform with the proposed changes to the Charter, NASDAQ OMX proposes to replace each of these supermajority voting requirements with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock. As discussed above with respect to the analogous Charter amendments, NASDAQ OMX believes that a ''majority of outstanding shares'' standard reflects a balanced approach that responds to stockholder feedback while appropriately maintaining NASDAQ OMX's defensive posture against hostile takeovers.

(e) Procedures for Filling Board Vacancies

Section 4.8 of the By-Laws sets forth the procedures to fill a director position that has become vacant, whether because of death, disability, disqualification, removal or resignation. Under the current provisions, if such a vacancy occurs, the Nominating & Governance Committee of the Board shall nominate, and the Board shall elect by majority vote, a person to fill the vacancy. In light of the addition of a right for stockholders to call a special meeting, as discussed above, NASDAQ OMX proposes amendments to Section 4.8 to state explicitly that vacancies on the Board are to be filled by a majority vote of the Board, and not by stockholders. In addition, to prescribe procedures in case multiple Board vacancies occur at the same time, the proposed amendments state that a Board vacancy shall be filled by the majority of the directors, even if there is less than a quorum, or by the sole remaining director, if there is only one director remaining on the Board. The proposed amendments do not change any of the other procedures for filling Board vacancies.

(f) Use of Electronic Means for Certain Notices and Related Waivers

Currently, Section 4.12(a) of the By-Laws provides that notice of any meeting of the Board shall be deemed duly given to a director if, among other methods, the notice is sent to the director at the address last made known in writing to NASDAQ OMX by telegraph, telefax, cable, radio or wireless. Section 4.12(b) of the By-Laws provides that such notice of a board meeting need not be given to any director if waived by the director in writing or by electronic transmission (or by telegram, telefax, cable, radio or wireless and subsequently confirmed in writing or by electronic transmission). NASDAQ OMX proposes amendments to Sections 4.12(a) and (b) to provide that both notices and waivers of such notices can be given by email or other means of written electronic transmission. These amendments are intended merely to expand the means through which notices and waivers of notices may be given, and the amendments do not affect any of the other procedural requirements of Sections 4.12(a) and (b). In addition, the proposed amendments reflect current practices, as a substantial amount of communications between NASDAQ OMX and its directors, outside of Board meetings, occurs through electronic means.

(g) Composition of the Management Compensation Committee

As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act and Rule 10C–1 under the Exchange Act,[37] NASDAQ recently amended its listing rules relating to compensation committees.[38] Since NASDAQ OMX is listed on NASDAQ, it must comply with these listing rules just like any other listed company. NASDAQ OMX therefore proposes amendments to Section 4.13(f) of the By-Laws, which relates to the composition of the Management Compensation Committee of NASDAQ OMX's Board, to conform to the recent amendments to NASDAQ's listing rules. Specifically, NASDAQ OMX proposes to state that the Management Compensation Committee must consist of at least two members and that each member shall meet the eligibility requirements set forth in the rules of The NASDAQ Stock Market.

(h) No Amendment or Repeal of Certain By-Law Amendments

While current Section 11.1 of the By-Laws provides for alteration, amendment, repeal and adoption of By-Laws by the stockholders, current Section 11.2 provides for alteration, amendment, repeal and adoption of By-Laws by the Board. These two sections operate as alternate means to alter, amend, repeal or adopt By-Laws. In

[35] This provision is analogous to Article Fifth, Paragraph D of the Charter, which is discussed under Section (ii)(a) above.

[36] This provision is analogous to Article Eighth, Paragraph A of the Charter, which is discussed under Section (ii)(a) above.

[37] *See* Public Law 111–203, 124 Stat. 1376 (2010) and 17 CFR 240.10C–1.

[38] *See* Securities Exchange Act Release No. 68640 (January 11, 2013), 78 FR 4554 (January 22, 2013) (SR–NASDAQ–2012–109). Among other things, the amendments require each NASDAQ-listed company, with certain exceptions, to have a compensation committee of its board of directors, consisting of a minimum of two independent directors who meet additional eligibility requirements relating to compensatory fees and affiliation.

other words, the stockholders may alter, amend, repeal or adopt By-Laws without any action by the Board, and vice versa. NASDAQ OMX proposes to add a proviso to Section 11.2 to state that no By-Law adopted by the stockholders shall be amended or repealed by the Board if the By-Law so adopted so provides. This is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholder action to amend or repeal the By-Laws.

(i) Non-Substantive Changes

The remaining proposed By-Law amendments are non-substantive changes, which will simplify and streamline the document. Specifically, NASDAQ OMX proposes minor changes to Section 3.3 to incorporate the new defined term ''Proposing Person,'' to use the term ''nomination'' rather than ''nominee'' for consistency and to correct two cross-references. NASDAQ OMX also proposes to delete obsolete references to the 3.75% Series A Convertible Notes due 2012 and the Series B Convertible Notes due 2012, which are no longer outstanding, in Section 12.7.

In addition, NASDAQ OMX proposes to correct typographical errors and/or delete obsolete cross-references in Article I(f), Section 4.3, Section 9.4(b), Section 12.5 and Section 12.6. Finally, NASDAQ OMX proposes to renumber and reorganize the provisions of the By-Laws, where necessary following the other amendments.

2. Statutory Basis

SCCP believes that its proposal is consistent with Section 17A(b)(3)(C) of the Act,[39] in that it assures a fair representation of shareholders and participants in the selection of directors and administration of its affairs. While the proposals relate to the organizational documents of NASDAQ OMX, rather than SCCP, SCCP is wholly owned by NASDAQ OMX, and therefore, NASDAQ OMX's stockholders have an indirect stake in SCCP. In addition, the participants in SCCP, to the extent any exist, could purchase stock in NASDAQ OMX in the open market, just like any other stockholder. The proposals respond directly to feedback from existing NASDAQ OMX stockholders about their participation in NASDAQ OMX's governance. As a result, NASDAQ OMX believes that the proposals assure a fair representation of its stockholders in the selection of directors and administration of its affairs, as well as the affairs of SCCP.

Specifically, in response to feedback from its existing investors, NASDAQ OMX is proposing changes to its Charter to replace each supermajority voting requirement with a ''majority of outstanding shares'' voting standard. NASDAQ OMX believes this approach will strike an appropriate balance between responding to stockholder feedback and protecting the Company and its investors against hostile takeovers. In addition, the clarifying changes to the Charter will make the Charter more concise and easier to understand. Both sets of changes to the Charter were approved by NASDAQ OMX's investors at the most recent annual meeting of stockholders.

NASDAQ OMX also proposes to eliminate the Certificate of Designation relating to the Series A Convertible Preferred Stock, which is no longer outstanding. This proposed change will enhance the clarity of NASDAQ OMX's Charter.

Finally, NASDAQ OMX proposes changes to its By-Laws: (i) To implement a stockholder right to call a special meeting; (ii) to enhance the ''advance notice'' procedures; (iii) to require certain information and agreements from director-nominees; (iv) to remove and replace the supermajority voting provisions to conform to the Charter amendments; (v) to clarify the procedures for filling Board vacancies; (vi) to allow the use of electronic means for certain notices and waivers; (vii) to conform the composition requirements for the Management Compensation Committee of NASDAQ OMX's Board with the NASDAQ listing rules; (vii)[sic] to prevent the Board from amending or repealing By-Law amendments approved by the stockholders; and (viii)[sic] to make other non-substantive changes.

The proposals relating to the stockholder right to call a special meeting and to remove and replace the supermajority voting requirements are responsive to feedback from NASDAQ OMX's stockholders. The additional procedural requirements relating to special and annual meetings will state clearly and explicitly the procedures stockholders must follow to propose business at such meetings. The requirement for certain information and agreements from director-nominees will ensure that nominees provide adequate information about themselves and also comply with applicable law and certain NASDAQ OMX policies and procedures relating to the Board. The prohibition on the Board amending or repealing By-Law amendments approved by the stockholders is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholders' wishes. Finally, the remaining changes are clarifying in nature, and they conform NASDAQ OMX's governance documents to current practices and applicable rules and make them clearer and easier to understand.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of NASDAQ OMX and not to the operations of SCCP, SCCP does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which SCCP consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–SCCP–2013–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

[39] 15 U.S.C. 78q–1(b)(3)(C).

100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–SCCP–2013–01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).*

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of SCCP. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–SCCP–2013–01 and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–29617 Filed 12–11–13; 8:45 am]

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[40] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71023; File No. SR–BATS–2013–059]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of a Proposed Rule Change in Connection With the Proposed Business Combination Involving BATS Global Markets, Inc. and Direct Edge Holdings LLC

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 25, 2013, BATS Exchange, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposed rule change (the ''Proposed Rule Change'') in connection with the proposed business combination (the ''Combination''), as described in more detail below, involving its parent company, BATS Global Markets, Inc. and Direct Edge Holdings LLC (''DE Holdings''), the indirect parent company of EDGX Exchange, Inc. (''EDGX'') and EDGA Exchange, Inc. (''EDGA''), each a national securities exchange registered with the Commission.

Upon completion of the Combination (the ''Closing''), BATS Global Markets, Inc. and DE Holdings will each become intermediate holding companies, held under a single new holding company. The new holding company, currently named ''BATS Global Markets Holdings, Inc.,'' will at that time change its name to ''BATS Global Markets, Inc.'' In addition, the current parent company of the Exchange, BATS Global Markets, Inc., will at that time change its name to ''BATS Global Markets Holdings, Inc.''

For ease of reference, this Proposed Rule Change will refer to the current parent company of the Exchange as ''Current BGM'' when referring to the entity prior to the Closing, and as ''BGM Holdings'' when referring to that entity after the Closing. The entity that will become the new top-level holding company that will, after Closing, own BGM Holdings and DE Holdings, will be referred to as ''New BGM.''

To effectuate the Combination, the Exchange seeks to obtain the Commission's approval of (i) resolutions of Current BGM's board of directors (the ''Resolutions'') making certain determinations regarding New BGM and the impact of the Combination on the Exchange; (ii) the proposed Amended and Restated Certificate of Incorporation of New BGM (the ''New BGM Charter''); (iii) the proposed Amended and Restated Bylaws of New BGM (the ''New BGM Bylaws''); (iv) the proposed amendments to Current BGM's Second Amended and Restated Certificate of Incorporation (the ''Current BGM Charter,'' and after such amendments, the ''BGM Holdings Charter''); (v) the proposed amendments to the Amended and Restated Bylaws of Current BGM (the ''Current BGM Bylaws,'' and after such amendments, the ''BGM Holdings Bylaws''); (vi) the proposed amendments to the By-Laws of the Exchange (the ''Exchange Bylaws''); (vii) the proposed amendments to Exchange Rule 2.3 to reflect the affiliation between the Exchange and two additional registered national securities exchanges; (viii) the proposed amendments to Exchange Rule 2.12 to reflect the affiliation between the Exchange and the routing broker for EDGA and EDGX; and (ix) the indirect acquisition by an affiliate of the Exchange of a Member[3] of the Exchange and the resulting affiliation between the Exchange and the Member of the Exchange, as required under Exchange Rule 2.10.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' is defined in Exchange Rule 1.5(n) as any registered broker or dealer that has been admitted to membership in the Exchange.

the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange submits this Proposed Rule Change to seek the Commission's approval of various changes to the organizational and governance documents of the Exchange and the Exchange's current and proposed future parent companies, changes to Exchange Rules,[4] and related actions that are necessary in connection with the Closing of the Combination, as described below.

Other than as described herein and set forth in the attached Exhibits 5A through 5H, the Exchange will continue to conduct its regulated activities (including operating and regulating its market and Members) in the manner currently conducted, and will not make any changes to its regulated activities in connection with the Combination. Except as set forth in this Proposed Rule Change, the Exchange is not proposing any amendments to its trading and regulatory rules at this time. If the Exchange determines to make any such changes, it will seek the approval of the Commission to the extent required by the Act, and the Commission's rules thereunder, and the Rules of the Exchange.

1. Current Corporate Structures

The Exchange and BATS Y-Exchange, Inc. (''BYX'' and together with the Exchange, the ''BATS Exchanges''), are each Delaware corporations that are national securities exchanges registered with the Commission pursuant to Section 6(a) of the Act.[5] Each BATS Exchange is a direct, wholly owned subsidiary of Current BGM, a Delaware corporation. Current BGM also owns 100 percent of the equity interest in BATS Trading, Inc., a Delaware corporation (''BATS Trading'') that is a broker-dealer registered with the Commission that provides routing services outbound from and, in certain instances inbound to, each BATS Exchange. In contemplation of the Combination, several new entities have been formed: New BGM, a Delaware corporation, is currently a wholly owned subsidiary of Current BGM, and is currently a shell company with no material assets or operations. New BGM, in turn, owns 100 percent of the equity interest in each of Blue Merger Sub Inc., a Delaware corporation (''Blue Merger Sub''), and Delta Merger Sub LLC, a Delaware limited liability company (''Delta Merger Sub''). Each of Blue Merger Sub and Delta Merger Sub are currently shell companies with no material assets or operations.

Current BGM is itself beneficially owned primarily by a consortium of several unaffiliated firms, including Members or affiliates of Members of the Exchange. No firm beneficially owns 20 percent or greater of Current BGM, and the only firms beneficially owning ten percent or greater of Current BGM are (i) GETCO Investments, LLC, an affiliate of KCG Holdings, Inc., (ii) BGM Holding, L.P., a holding company itself owned by entities affiliated with the Spectrum Equity Investors and TA Associates Management private investment funds, and (iii) Strategic Investments I, Inc., an affiliate of Morgan Stanley.[6] Seven other firms each beneficially own five percent or greater but less than ten percent of Current BGM, while seven other firms as well as various individuals each beneficially own less than five percent of Current BGM.

DE Holdings, a Delaware limited liability company, owns 100 percent of the equity interest in Direct Edge, Inc., a Delaware corporation (''DEI''). DEI, in turn, owns 100 percent of the equity interest in two registered national securities exchanges, EDGX and EDGA, each a Delaware corporation (together, the ''DE Exchanges''). In addition, DE Holdings owns 100 percent of the equity interest in Direct Edge ECN LLC d/b/a DE Route, a Delaware limited liability company and the routing broker-dealer for the DE Exchanges (''DE Route'').

As a limited liability company, ownership in DE Holdings is represented by units held by ''LLC Members.'' Certain of the DE Holdings LLC Members are Members or affiliates of Members of the Exchange. The Exchange understands that International Securities Exchange Holdings, Inc. (''ISE Holdings'') is the only LLC Member of DE Holdings to beneficially own greater than 20 percent of the equity interest in DE Holdings. Other than ISE Holdings, the only firms beneficially owning ten percent or greater of DE Holdings (but in each case less than 20 percent) are Citadel Securities LLC, The Goldman Sachs Group, Inc., and an affiliate of KCG Holdings, Inc. No LLC Member beneficially owns five percent or greater but less than ten percent of DE Holdings. Five other firms as well as various individuals each beneficially own less than five percent of DE Holdings.

2. The Combination

On August 23, 2013, an Agreement and Plan of Merger (the ''Merger Agreement'') was entered into among Current BGM, New BGM, DE Holdings, Blue Merger Sub, Delta Merger Sub, and Cole, Schotz, Meisel, Forman & Leonard, P.A., solely in its capacity as representative of the LLC Members. Pursuant to and subject to the terms of the Merger Agreement, at the Closing, among other things:

(i) Blue Merger Sub will be merged with and into Current BGM, whereupon the separate existence of Blue Merger Sub will cease and Current BGM will be the surviving company (the ''BATS Merger'');

(ii) Delta Merger Sub will be merged with and into DE Holdings, whereupon the separate existence of Delta Merger Sub will cease and DE Holdings will be the surviving company (the ''Direct Edge Merger'');

(iii) by virtue of the BATS Merger and without any action required on the part of Current BGM, New BGM, Blue Merger Sub or any holder of Current BGM stock, each outstanding share of Current BGM stock issued and outstanding will be converted into the right to receive shares of New BGM stock, and each outstanding share of Blue Merger Sub issued and outstanding will be converted into one share of Current BGM, such that Current BGM will become a wholly owned subsidiary of New BGM; and

(iv) by virtue of the Direct Edge Merger and without any action required on the part of DE Holdings, New BGM, Delta Merger Sub, or any LLC Member, each LLC Member's membership interests in DE Holdings will be converted into the right to receive shares of New BGM stock, and each unit of ownership interest of Delta Merger Sub issued and outstanding will be converted into one unit of ownership of DE Holdings, such that DE Holdings will become a wholly owned subsidiary of New BGM.

Upon the Closing, each of Current BGM and New BGM will amend and restate their respective certificates of incorporation to, among other things, change their names such that New BGM will be renamed ''BATS Global Markets, Inc.'' and Current BGM will be renamed ''BATS Global Markets Holdings, Inc.''

[4] The term ''Exchange Rules'' refers to the rules of the Exchange, including those for equities and options.

[5] 15 U.S.C. 78f(a).

[6] For purposes of this Proposed Rule Change, references to the beneficial ownership of a ''firm'' refers to the aggregate beneficial ownership of the firm and its affiliated entities.

3. Post-Closing Corporate Structure

As a result of the Combination, New BGM will own (i) 100 percent of the equity interest in BGM Holdings (the entity previously referred to as ''Current BGM''), and (ii) 100 percent of the LLC membership interests in DE Holdings. BGM Holdings will continue to own 100 percent of the equity interest in each BATS Exchange and BATS Trading. DE Holdings will continue to own 100 percent of the equity interest in DE Route [7] and DEI. DEI will, in turn, continue to own 100 percent of the equity interest in each DE Exchange. Each of the BATS Exchanges and BATS Trading, on the one hand, and the DE Exchanges and DE Route, on the other hand, will continue to operate separately.

New BGM, as the new top-level holding company for the combined businesses, will have widely dispersed ownership, divided among the several firms and individuals that previously held equity interests in each of Current BGM and DE Holdings. Of the firms and individuals that are expected to hold equity interests in New BGM after the Closing, none will beneficially own 20 percent or greater of New BGM and only an affiliate of KCG Holdings, Inc. will beneficially own ten percent or greater. Seven firms will beneficially own five percent or greater but less than ten percent, while 12 other firms as well as various individuals will each beneficially own less than five percent of New BGM.[8]

[7] As described above, the Combination will result in a change of ownership of both BATS Trading and DE Route, each of which is a member of the Financial Industry Regulatory Authority, Inc. (''FINRA''). The Exchange understands that, pursuant to NASD Rule 1017, each of BATS Trading and DE Route is seeking approval for this change of ownership from FINRA.

[8] ISE Holdings, which will beneficially own greater than five percent but less than ten percent of New BGM, will receive common stock of New BGM designated as Class A Non-Voting Common Stock. As set forth in the proposed New BGM Charter and described below, shares of Class A Non-Voting Common Stock are generally non-voting, except with respect to certain actions that would adversely affect the preferences, rights or powers of the holders of Class A Non-Voting Common Stock disproportionately relative to Voting Common Stock or the Class B Non-Voting Common Stock. *See* New BGM Charter, Art. FOURTH, para. (b)(ii). Pursuant to the New BGM Charter and the Investor Rights Agreement expected to be entered into at Closing and attached as Exhibit A to the New BGM Bylaws (the ''Investor Rights Agreement''), ISE Holdings' shares of Class A Non-Voting Common Stock may convert to Voting Common Stock (i) automatically with respect to any shares transferred to persons other than Related Persons of ISE Holdings; (ii) upon the termination of the Investor Rights Agreement; and (iii) automatically with respect to any shares of Class A Non-Voting Common Stock sold by ISE Holdings in any public offering of the stock of New BGM. *See* New BGM Charter, Art. FOURTH, para. (c); Investor Rights Agreement, Section 2.2(j).

4. Voting and Ownership Limitations of Current BGM; Resolutions

The Current BGM Charter provides that (i) no person, either alone or together with its ''Related Persons,'' [9] may own, directly or indirectly, of record or beneficially, shares constituting more than 40 percent of any class of its capital stock, and no Exchange Member, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, shares constituting more than 20 percent of any class of its capital stock (collectively, the ''BGM Ownership Limitation''), and (ii) subject to certain exceptions, no person, either alone or together with its Related Persons, at any time, may, directly, indirectly or pursuant to any of various arrangements, vote or cause the voting of shares or give any consent or proxy with respect to shares representing more than 20 percent of the voting power of its then issued and outstanding capital stock (the ''BGM Voting Limitation'').[10] Purported transfers that would result in a violation of the BGM Ownership Limitation are not recognized by Current BGM to the extent of any ownership in excess of the BGM Ownership Limitation, and purported voting or voting arrangements in violation of the BGM Voting Limitation are not honored by Current BGM to the extent of any voting in excess of the limitation.[11]

However, the Current BGM Charter provides that each of the BGM Ownership Limitation and the BGM Voting Limitation may be waived (except with respect to Exchange Members and their Related Persons) pursuant to a resolution duly adopted by the board of directors of Current BGM if, in connection with taking such action, the board of directors states in such resolution that it is the determination of the board of directors that the waiver:

- Will not impair the ability of each BATS Exchange to carry out its functions and responsibilities as an ''exchange'' under the Act and the rules and regulations promulgated thereunder;
- is otherwise in the best interests of Current BGM, its stockholders, and each BATS Exchange;
- will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder; and
- shall not be effective until it is filed with and approved by the Commission.[12]

In granting such a waiver, the Current BGM board of directors has the discretion to impose on the person and its Related Persons, such conditions and restrictions that it deems necessary, appropriate or desirable in furtherance of the objectives of the Act and the rules and regulations promulgated thereunder, and the governance of each BATS Exchange.[13]

In addition, notwithstanding the above, the Current BGM Charter provides [14] that in any case where a person, either alone or with its Related Persons, would own or vote more than the BGM Ownership Limitation or BGM Voting Limitation, respectively, upon consummation of any proposed sale, assignment or transfer of Current BGM's capital stock, such a transaction will not become effective until the Current BGM board of directors determines, by resolution, that such person and its

[9] The Current BGM Charter generally defines a ''Related Person'' as, with respect to any person, (i) any ''affiliate'' of such person (as defined in Rule 12b–2 under the Act); (ii) any other person with which such first person has any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of shares of the capital stock of Current BGM (provided no person is deemed a Related Person pursuant to clause (ii) solely as a result of such person's being or becoming a party to the Investor Rights Agreement entered into by and among Current BGM and the stockholders named therein on January 1, 2008); (iii) in the case of a person that is a company, corporation or similar entity, any executive officer (as defined under Rule 3b–7 under the Act) or director of such person and, in the case of a person that is a partnership or limited liability company, any general partner, managing member or manager of such person, as applicable; (iv) in the case of any person that is a registered broker or dealer that has been admitted to membership in either of the BATS Exchanges (for purposes of this definition of ''Related Person,'' each such national securities exchange shall be referred to generally as an ''Exchange'' and any member of such Exchange, an ''Exchange Member''), any person that is associated with the Exchange Member (as determined using the definition of ''person associated with a member'' as defined under Section 3(a)(21) of the Act); (v) in the case of a person that is a natural person and Exchange Member, any broker or dealer that is also an Exchange Member with which such person is associated; (vi) in the case of a person that is a natural person, any relative or spouse of such person, or any relative of such spouse who has the same home as such person or who is a director or officer of Current BGM or any of its parents or subsidiaries; (vii) in the case of a person that is an executive office (as defined under Rule 3b–7 under the Act) or a director of a company, corporation or similar entity, such company, corporation or entity, as applicable; and (viii) in the case of a person that is a general partner, managing member or manager of a partnership or limited liability company, such partnership or limited liability company, as applicable. *See* Current BGM Charter, Art. FIFTH, para. (a)(ii).

[10] *See* Current BGM Charter, Art. FIFTH, para. (b).

[11] *See* Current BGM Charter, Art. FIFTH, para. (d).

[12] *See* Current BGM Charter, Art. FIFTH, para. (b)(ii)(B).

[13] *Id.*

[14] *See* Current BGM Charter, Art. FIFTH, para. (b)(iii).

Related Persons are not subject to any ''statutory disqualification,'' as defined in Section 3(a)(39) of the Act.[15]

As described above, upon the Closing of the proposed Combination, New BGM will become the sole owner of Current BGM (referred to as ''BGM Holdings'' upon the Closing and thereafter). Additionally, as discussed in more detail below, the Exchange is also seeking the Commission's approval for Current BGM's proposal to, contemporaneously with the Closing, amend and restate the Current BGM Charter as the BGM Holdings Charter, and for New BGM to adopt the New BGM Charter. Unlike the Current BGM Charter, as proposed to be amended, the BGM Holdings Charter will not contain the BGM Ownership Limitation or the BGM Voting Limitation.[16] While the BGM Ownership Limitation and BGM Voting Limitation will not be contained in the BGM Holdings Charter, the BGM Holdings Charter specifies that BGM Holdings' sole stockholder will be New BGM, and the New BGM Charter will contain substantively identical ownership and voting limitation provisions, which will also become effective contemporaneously with the Closing.[17]

As a result, New BGM's acquisition of ownership and voting rights in BGM Holdings upon Closing would not cause New BGM to contravene the BGM Ownership Limitation or BGM Voting Limitation, because the Current BGM Charter will be contemporaneously amended to eliminate the BGM Ownership Limitation and the BGM Voting Limitation, and the New BGM Charter will be contemporaneously amended with respect to New BGM's stockholders.

Nevertheless, because the Combination will result in a change of ownership of Current BGM (in that New BGM will become the sole stockholder of Current BGM), the Exchange and the board of directors of Current BGM each believe that it is appropriate for the board of directors of Current BGM to adopt the Resolutions, attached as Exhibit 5A, making certain determinations with respect to New BGM and the Combination similar to those that would be necessary to waive the BGM Ownership Limitation and BGM Voting Limitation. Specifically, the board of directors of Current BGM determined that:

- The acquisition of the proposed ownership by New BGM in Current BGM will not impair the ability of each BATS Exchange to carry out its functions and responsibilities as an ''exchange'' under the Act and the rules and regulations promulgated thereunder, is otherwise in the best interests of Current BGM, its stockholders and the BATS Exchanges, and will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder;
- the acquisition or exercise of the proposed voting rights by New BGM in Current BGM will not impair the ability of each BATS Exchange to carry out its functions and responsibilities as an ''exchange'' under the Act and the rules and regulations promulgated thereunder, that it is otherwise in the best interests of the Current BGM, its stockholders and the BATS Exchanges, and that it will not impair the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder;
- neither New BGM, nor any of its Related Persons, is subject to ''statutory disqualification'' within the meaning of Section 3(a)(39) of the Act; [18] and
- neither New BGM, nor any of its Related Persons (excluding BATS Trading, an Exchange Member whose affiliation with the Exchanges has been approved/permitted by the Commission pursuant to Rule 2.11 and Rule 2.12 of each Exchange),[19] is an Exchange Member.[20]

The Exchange has reviewed such Resolutions and requests that the Commission approve such Resolutions. The Exchange believes that the Commission should approve the Resolutions, as the Combination will not impair the ability of either BATS Exchange to carry out its functions and responsibilities as an ''exchange'' under the Act and the rules and regulations promulgated thereunder, or the ability of the Commission to enforce the Act and the rules and regulations promulgated thereunder. The BATS Exchanges will continue to operate and regulate their markets and Members as they have done prior to the Combination. Thus, each BATS Exchange will continue to enforce the Act, the Commission's rules thereunder, and each Exchange's own rules, in the manner it does today. Further, the Commission will continue to have plenary regulatory authority over the BATS Exchanges, as is currently the case with these entities.

The Exchange also notes that the Resolutions reflect the determination by the Current BGM board of directors that the Combination and New BGM's resulting ownership and voting rights in BGM Holdings are otherwise in the best interests of Current BGM, its stockholders, and the BATS Exchanges.

In addition, the Exchange notes that notwithstanding the Resolutions and the Combination, the BGM Ownership Limitation and the BGM Voting Limitation will remain in place with respect to potential future transactions involving the ultimate parent company of the BATS Exchanges. As described in more detail below, the Exchange is also proposing the adoption of the New BGM Charter and the New BGM Bylaws, which are modeled in large part on the Current BGM Charter and the Current BGM Bylaws (and include provisions substantially identical to the BGM Ownership Limitation and the BGM Voting Limitation), creating an ownership structure that will continue to provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Act with respect to the Exchange, its direct and indirect parent entities, and its directors, officers, employees and agents to the extent they are involved in the activities of the Exchange, and protect the independence of the Exchange's self-regulatory activities.

The Exchange therefore requests that the Commission approve the Resolutions, attached as Exhibit 5A.

5. Adoption of New BGM Charter and New BGM Bylaws

New BGM was incorporated on August 22, 2013, under the name BATS Global Markets Holdings, Inc., by filing a certificate of incorporation with the Secretary of State of Delaware. Upon incorporation, New BGM also adopted bylaws. New BGM is currently a shell company, with no material assets or operations. Therefore, neither its certificate of incorporation nor bylaws currently need or contain any provisions that would be appropriate for an entity that has direct or indirect ownership in a registered national securities exchange.

[15] 15 U.S.C. 78c(a)(39).

[16] *See infra* text accompanying note 58.

[17] *See infra* text accompanying notes 23 through 27.

[18] 15 U.S.C. 78c(a)(39).

[19] As noted above, BATS Trading is a routing broker-dealer and an Exchange Member that is affiliated with the Exchange, pursuant to Exchange Rules 2.11 and 2.12, and a direct subsidiary of Current BGM. The same structure will continue to be in place following the Closing and BATS Trading will remain a direct subsidiary of BGM Holdings.

[20] In addition, the Resolutions contain a determination that the execution and delivery of the Merger Agreement by New BGM constituted notice of New BGM's intention to acquire ownership and voting rights in excess of the BGM Ownership Limitation and BGM Voting Limitation, respectively, in writing and not less than 45 days before the Closing. *See* Current BGM Charter, Art. FIFTH, para. (b)(iv).

However, in connection with the Combination, upon the Closing, New BGM will become (i) the indirect owner (through BGM Holdings) of each of the BATS Exchanges and BATS Trading, (ii) the indirect owner (through DE Holdings and DEI) of each of the DE Exchanges, and (iii) the indirect owner (through DE Holdings) of DE Route. As a result, the Exchange is proposing that in connection with New BGM's acquisition of indirect ownership in the Exchange, New BGM would amend and restate each of its certificate of incorporation and bylaws to adopt provisions designed to protect and maintain the integrity of the self-regulatory functions of the Exchange and to facilitate the ability of the Exchange and the Commission to carry out their regulatory and oversight obligations under the Act. Each of the New BGM Charter and the New BGM Bylaws is modeled on, and substantially similar to, the Current BGM Charter and Current BGM Bylaws, respectively, except with respect to the differences described below.

a. New BGM Charter

The New BGM Charter is proposed to be adopted as the Amended and Restated Certificate of Incorporation of BATS Global Markets Holdings, Inc. However, the New BGM Charter will effect an amendment to the name of the corporation upon Closing such that it will be renamed ''BATS Global Markets, Inc.'' [21] The change of name is intended to reflect the fact that New BGM is succeeding to the business of Current BGM in all respects, notwithstanding the technical change of corporate entity that will result from the structure of the Combination.

The New BGM Charter, which is attached as Exhibit 5B, is substantially similar to the Current BGM Charter, which the Commission has previously found to be consistent with the Act.[22] It contains provisions imposing the BGM Ownership Limitation and the BGM Voting Limitation on any owners or prospective owners of New BGM.[23] In addition, similar to the Current BGM Charter, the New BGM Charter prohibits a Member of any of New BGM's registered national securities exchange subsidiaries, either alone or together with such Member's Related Persons,[24] from owning, directly or indirectly, of record or beneficially, more than 20 percent of shares of any class of capital stock of New BGM.[25] As in the Current BGM Charter, purported sales, transfers, assignments, pledges or ownership that would result in a violation of the BGM Ownership Limitation will not be recognized by New BGM to the extent of any ownership in excess of the limitation, and New BGM shall have the right to redeem the shares in excess of the applicable ownership limit for their fair market value. In addition, in contrast to the Current BGM Charter, the New BGM Charter would clarify that these same non-recognition and redemption rights apply in the case of a purported conversion of shares resulting in a violation of the BGM Ownership Limitation, as apply to purported sales, transfers, assignments, pledges or ownership that result in such a violation.[26] Similarly, as in the Current BGM Charter, purported voting or voting arrangements in violation of the BGM Voting Limitation will not be honored by New BGM to the extent of any voting in excess of the limitation.[27]

These provisions are designed to prevent any stockholder from exercising undue control over the operation of the BATS Exchanges or the DE Exchanges (together, the ''Exchange Subsidiaries''), each of which New BGM will indirectly own following the Combination, and to assure that each Exchange Subsidiary and the Commission are able to carry out their regulatory obligations under the Act.

Further, consistent with the Current BGM Charter, the New BGM Charter provides that, for so long as New BGM controls, directly or indirectly, a registered national securities exchange, before any amendment to the New BGM Charter may be effective, those changes must be submitted to the board of directors of each such exchange, and if the amendment is required to be filed with, or filed with and approved by the Commission pursuant to Section 19(b) of the Act,[28] such change shall not be effective until filed with, or filed with and approved by, the Commission.[29] The Exchange believes that these provisions will assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.

The provisions of the New BGM Charter differ from those of the Current BGM Charter in certain limited respects:

- The total number of shares of common stock that New BGM will have authority to issue is 75,000,000, divided between 55,000,000 shares designated as Voting Common Stock, 10,000,000 shares designated as Class A Non-Voting Common Stock, and 10,000,000 shares designated as Class B Non-Voting Common Stock.[30] This represents an increase from the 25,000,000 shares that Current BGM is authorized to issue (divided between 24,500,000 shares designated as Voting Common Stock and 500,000 shares designated as Non-Voting Common Stock). The increase in authorized shares is due to the greater number of stockholders that New BGM will have following the Combination, as compared to Current BGM, as well as to provide an adequate number of authorized shares to allow for potential future issuances. The rights and preferences of the Class A Non-Voting Common Stock and Class B Non-Voting Common Stock are identical in all respects, except for conversion rights. Class A Non-Voting Common Stock converts into Voting Common Stock automatically upon transfer to a person other than a Related Person of such holder, upon termination of the Investor Rights Agreement, and may be converted into Voting Common Stock at any time at the option of the holder.[31] Class B Non-Voting Common Stock, however, may only be converted into Voting Common Stock following a ''Qualified Transfer.'' [32] The term

[21] *See* New BGM Charter, Art. FIRST.

[22] *See* Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008).

[23] *See* New BGM Charter, Art. FIFTH paras. (b)(i)(A) and (C).

[24] The New BGM Charter defines ''Related Persons'' consistent with the definition in the Current BGM Charter, *see supra* note 9, except that (i) the definition of ''Exchange'' for purposes of such definition is expanded to refer to any national securities exchange that is a direct or indirect subsidiary of New BGM, and (ii) the reference to the Investor Rights Agreement has been revised to refer to the Investor Rights Agreement to be entered into upon Closing.

[25] *See* New BGM Charter, Art. FIFTH para. (b)(i)(B).

[26] *See* New BGM Charter, Art. FIFTH, paras. (d)–(e).

[27] *See* New BGM Charter, Art. FIFTH, para. (d).

[28] 15 U.S.C. 78s(b).

[29] *See* New BGM Charter, Art. TWELFTH.

[30] *See* New BGM Charter, Art. FOURTH, para. (a).

[31] *See* New BGM Charter, Art. FOURTH, para. (c). In addition, Class A Non-Voting Common Stock held by ISE Holdings will convert automatically if ISE Holdings includes any such shares in any public offering of stock of New BGM.

[32] The Exchange notes that, notwithstanding the conversion features, neither Class A Non-Voting Common Stock nor Class B Non-Voting Common Stock may convert into Voting Common Stock if such a conversion would cause the stockholder to own, alone or with its Related Persons, directly or indirectly, of record or beneficially (i) more than 40% of any class of capital stock of New BGM in contravention of the BGM Ownership Limitation (unless a waiver is granted by the board of directors of New BGM and approved by the Commission), or (ii) in the case of an Exchange Member stockholder, more than 20% of any class of capital stock of New BGM. *See* New BGM Charter, Art. FIFTH, para. (b)(i)(A) and (B). In addition, to the extent that any Class A Non-Voting Common Stock or Class B Non-Voting Common Stock is converted into Voting Common Stock, the stockholder owning the converted Voting Common Stock would be subject to the BGM Voting Limitation and not permitted, either alone or together with its Related Persons, at any time, directly, indirectly or pursuant to any of

Continued

''Qualified Transfer'' means a sale or other transfer of Class B Non-Voting Common Stock by a holder of such shares: (a) In a widely distributed public offering registered pursuant to the Securities Act of 1933; [33] (b) in a private sale or transfer in which the relevant transferee (together with its Affiliates, as defined below, and other transferees acting in concert with it) acquires no more than two percent of any class of voting shares (as defined in 12 CFR 225.2(q)(3) and determined by giving effect to any such permitted conversion of transferred shares of Class B Non-Voting Common Stock upon such transfer pursuant to Article FOURTH of the New BGM Charter), (c) to a transferee that (together with its Affiliates and other transferees acting in concert with it) owns or controls more than 50 percent of any class of voting shares (as defined in 12 CFR 225.2(q)(3)) of New BGM without regard to any transfer of shares from the transferring holder of shares of Class B Non-Voting Common Stock, or (d) to New BGM. As used above, the term ''Affiliate'' means, with respect to any person, any other person directly or indirectly controlling, controlled by or under common control with such person, and ''control'' (including, with correlative meanings, the terms ''controlled by'' and ''under common control with'') has the meaning set forth in 12 CFR 225.2(e)(1).[34] The Exchange understands that certain persons that will become stockholders of New BGM as of the Closing may be, or may become, subject to restrictions under the Bank Holding Company Act of 1956 [35] on the extent to which they are permitted to own voting stock of New BGM or certain types of non-voting stock convertible into voting stock of New BGM. The Exchange understands that New BGM's Class B Non-Voting Common Stock is designed to permit a stockholder that may be subject to such restrictions to maintain an economic interest in New BGM, through ownership of Class B Non-Voting Common Stock, in excess of its voting interest and in compliance with such restrictions, for purposes of the Bank Holding Company Act of 1956.

- The term ''Exchange,'' as used in the New BGM Charter, is defined to refer to ''any national securities exchange registered under Section 6 of the Act with the [Commission] that is a direct or indirect subsidiary'' of New BGM.[36] The term ''Exchange'' is used throughout the New BGM Charter to refer to subsidiaries of New BGM that are registered as national securities exchanges. This definition differs from the definition contained in the Current BGM Charter, which defines ''Exchange'' by specific reference to the names of the BATS Exchanges. Because, following the Combination, the DE Exchanges will also become indirect subsidiaries of New BGM, the definition in the New BGM Charter has been expanded so as to capture the DE Exchanges in addition to the BATS Exchanges.
- The New BGM Charter reflects certain non-substantive differences and typographical corrections, including conforming the spelling of ''Bylaws'' throughout the organizational documents of New BGM and its proposed subsidiaries.

b. New BGM Bylaws

As with the New BGM Charter, the New BGM Bylaws, which are set forth in Exhibit 5C, contain provisions substantially similar to those of the Current BGM Bylaws, which the Commission has previously found to be consistent with the Act.[37] This includes provisions that are designed to maintain the independence of the self-regulatory functions of the Exchange Subsidiaries. Consistent with the Current BGM Bylaws, the New BGM Bylaws provide that New BGM and its officers, directors, employees and agents submit to the Commission's jurisdiction with respect to activities relating to any of the Exchange Subsidiaries,[38] and, for so long as New BGM controls, directly or indirectly, such Exchange Subsidiary, New BGM agrees to provide the Commission and each Exchange Subsidiary with access to its books and records that are related to the operation or administration of the Exchange Subsidiary.[39] In addition, to the extent they are related to the operation or administration of an Exchange Subsidiary, the books, records, premises, officers, directors, agents, and employees of New BGM shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Exchange Subsidiary for purposes of, and subject to oversight pursuant to, the Act.[40]

The New BGM Bylaws also provide that all books and records of an Exchange Subsidiary reflecting confidential information pertaining to the self-regulatory function of the Exchange Subsidiary (including but not limited to disciplinary matters, trading data, trading practices and audit information) that shall come into the possession of New BGM shall not be made available other than to those officers, directors, employees and agents of New BGM that have a reasonable need to know the contents thereof, and shall be retained in confidence by New BGM, the members of its board of directors, its officers, employees and agents, and not used for any non-regulatory purposes.[41] The New BGM Bylaws, however, specify that the New BGM Bylaws (including these confidentiality provisions) shall not be interpreted so as to limit or impede the rights of the Commission or an Exchange Subsidiary to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of New BGM to disclose such confidential information to the Commission or an Exchange Subsidiary.[42]

In addition, for so long as New BGM controls, directly or indirectly, an Exchange Subsidiary, the directors, officers, employees and agents of New BGM are required to give due regard to the preservation of the independence of each Exchange Subsidiary's self-regulatory functions, and to its obligations to investors and the general public, and not take any actions which would interfere with the effectuation of decisions by the board of directors of such Exchange Subsidiary relating to regulatory functions (including disciplinary matters) or which would interfere with such Exchange Subsidiary's ability to carry out its responsibilities under the Act.[43] Further, the New BGM Bylaws require that, for so long as New BGM controls, directly or indirectly, an Exchange Subsidiary, before any amendment to or repeal of any provision of the New BGM Bylaws may be effective, those changes must be submitted to the board of directors of each Exchange Subsidiary, and, if such amendment is required to be filed with, or filed with and

various arrangements, to vote or cause the voting of shares or give any consent or proxy with respect to shares representing more than 20 percent of the voting power of the then issued and outstanding capital stock of New BGM (unless a waiver is granted by the board of directors of New BGM and approved by the Commission). *See* New BGM Charter, Art. FIFTH, para. (b)(i)(C).

[33] 15 U.S.C. 77a.

[34] *See* New BGM Charter, Art. FOURTH, para. (d)(i).

[35] 12 U.S.C. 1841 *et seq.*

[36] *See* New BGM Charter, Art. FIFTH, para. (a)(ii).

[37] *See* Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008).

[38] *See* New BGM Bylaws, Section 14.05.

[39] *See* New BGM Bylaws, Section 14.03.

[40] *Id.*

[41] *See* New BGM Bylaws, Section 14.02.

[42] *See id.*

[43] *See* New BGM Bylaws, Section 14.01.

approved by, the Commission before the changes may be effective under Section 19 of the Act and the rules promulgated thereunder, then the proposed changes shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.[44] The Exchange believes that these provisions will assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.

The provisions of the New BGM Bylaws differ from those of the Current BGM Bylaws in certain limited respects:

- The New BGM Bylaws provide for two separate corporate officer positions, one known as the Chief Executive Officer and another known as the President. The Current BGM Bylaws, in contrast, provide for a combined position known as the President and Chief Executive Officer.[45] Under the New BGM Bylaws, the Chief Executive Officer will be the chief executive officer of New BGM and subject to the control of the board of directors of New BGM, has general supervision, direction and control of the business and affairs of New BGM,[46] while the President will be a senior executive officer with certain designated powers, among other things, to serve as the chief executive officer in the absence or disability of the Chief Executive Officer.[47] References to corporate officers throughout the New BGM Bylaws reflect this difference. The difference in corporate officer designations is intended to facilitate the anticipated executive leadership of New BGM following the Combination. It is anticipated that, following the Combination, the current President and Chief Executive Officer of Current BGM will become the Chief Executive Officer of New BGM, while the current Chief Executive Officer of DE Holdings will become the President of New BGM.
- The New BGM Bylaws provide for a board of directors consisting of 15 members, or such other number of members as the board of directors determines from time to time. The Current BGM Bylaws provide that the board of directors will consist of one or more members, as determined by resolution of the board of directors.[48] The size of the New BGM board is proposed to be initially set at 15 in order to reflect the anticipated initial membership of the board of directors of New BGM. The Current BGM board of directors currently has 13 members. After the Closing, it is anticipated that the New BGM board of directors will consist of the same members as the Current BGM board, except that the New BGM board will be expanded by two members, to include representatives of two additional firms that are currently LLC Members of DE Holdings but will, by virtue of the Combination, become stockholders of New BGM.
- Section 5.02(a) of the Current BGM Bylaws sets forth the process for representatives of Current BGM to attend meetings of, and vote the shares of, any corporation, partnership or other entity (including each BATS Exchange) in which Current BGM may hold stock, partnership, or other equity interests. This provision parenthetically refers to the BATS Exchanges to reflect the fact that Current BGM is the direct owner of each of the BATS Exchanges. However, following the Combination, New BGM will instead be the direct owner of each of BGM Holdings and DE Holdings. The corresponding provision in the New BGM Bylaws therefore contains a similar parenthetical reference to its ownership of BGM Holdings and DE Holdings, rather than the BATS Exchanges.[49] In addition, the New BGM Bylaws include a reference to meetings of ''members'' of any ''limited liability company'' in which New BGM holds equity interests, which terms are not included in the corresponding provision in the Current BGM Bylaws.[50] This is intended to reflect the fact that New BGM will, following the Closing, be the sole member of DE Holdings, a limited liability company, while Current BGM does not hold equity in any limited liability companies.[51] In addition, the Current BGM Bylaws contain provisions that relate to Current BGM's voting of shares in the election of directors, and Members of the Member Nominating Committees, of the BATS Exchanges.[52] These provisions will not be applicable to New BGM and are not included in the New BGM Bylaws, as the BATS Exchanges will be directly owned by BGM Holdings, rather than New BGM.[53]
- The term ''Exchange,'' as used in the New BGM Bylaws, is defined to refer to ''any national securities exchange registered with the [Commission] under Section 6 of the [Act] that is a direct or indirect subsidiary'' of New BGM.[54] The term ''Exchange'' is used throughout the New BGM Bylaws to refer to subsidiaries of New BGM that are registered as national securities exchanges. The Current BGM Bylaws either refer to each BATS Exchange by name or define ''Exchange'' by specific reference to the BATS Exchanges. Because, following the Combination, the DE Exchanges will also become indirect subsidiaries of New BGM, the definition in the New BGM Bylaws has been expanded so as to capture the DE Exchanges in addition to the BATS Exchanges.
- The New BGM Bylaws reflect certain non-substantive updates to dates of agreements and cross-references, as well as typographical corrections, including conforming the spelling of ''Bylaws'' throughout the organizational documents of New BGM and its proposed subsidiaries.

6. Adoption of BGM Holdings Charter and BGM Holdings Bylaws

Effective as of the Closing of the Combination, BGM Holdings (previously referred to as Current BGM) will continue to hold direct ownership of the BATS Exchanges and BATS Trading, but will no longer be the ultimate holding company of the corporate structure, itself being a wholly owned subsidiary of New BGM. As a result, provisions of the Current BGM Charter and Current BGM Bylaws, which contemplate an entity that was the ultimate holding company in the corporate structure, will no longer be appropriate. The Exchange is therefore proposing the amendment and restatement of each of the Current BGM Charter (as amended, referred to as the ''BGM Holdings Charter'') and the Current BGM Bylaws (as amended, referred to as the ''BGM Holdings Bylaws''). Each of the proposed BGM Holdings Charter and the BGM Holdings Bylaws are modeled on, and substantially similar to, the current certificate of incorporation and bylaws, respectively, of DEI, which is similarly situated as an intermediate holding company between DE Holdings and the DE Exchanges. The Commission has previously found the DEI certificate of incorporation and bylaws to be consistent with the Act.[55]

Following the Closing, BGM Holdings will be the sole stockholder of the BATS Exchanges. Although BGM Holdings will not carry out any regulatory

[44] *See* New BGM Bylaws, Art. XII.

[45] *Compare* New BGM Bylaws, Sections 4.01 and 4.02 *with* Current BGM Bylaws, Sections 4.01 and 4.02(c) and (d).

[46] *See* New BGM Bylaws, Section 4.02(c).

[47] *See* New BGM Bylaws, Section 4.02(d).

[48] *Compare* New BGM Bylaws, Section 3.01 *with* Current BGM Bylaws, Section 3.01.

[49] *See* New BGM Bylaws, Section 5.02.

[50] *Id.*

[51] *Compare* New BGM Bylaws, Section 5.02 *with* Current BGM Bylaws, Section 5.02.

[52] *See* Current BGM Bylaws, Sections 5.02(b) and (c).

[53] Substantially identical provisions are instead included in the BGM Holdings Bylaws. *See infra* text accompanying note 70.

[54] *See* New BGM Bylaws, Section 10.02.

[55] *See* Securities Exchange Act Release No. 62515 (July 16, 2010), 75 FR 43584 (July 26, 2010) (SR–EDGX–2010–02).

functions, the Exchange notes that its activities with respect to the operation of the BATS Exchanges must be consistent with, and must not interfere with, the self-regulatory obligations of each BATS Exchange. The BGM Holdings Charter and the BGM Holdings Bylaws therefore include certain provisions that are designed to maintain the independence of the BATS Exchanges' self-regulatory functions, enable the BATS Exchanges to operate in a manner that complies with the federal securities laws, including the objectives of Sections 6(b) [56] and 19(g) [57] of the Act, and facilitate the ability of each BATS Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act.

a. BGM Holdings Charter

With respect to ownership and control of BGM Holdings, the proposed BGM Holdings Charter, attached as Exhibit 5D, specifically provides that BGM Holdings' sole stockholder will be New BGM.[58] This restriction is designed to assure that any change to the ownership or control of the BATS Exchanges may only occur through a change in the ownership or control of New BGM. As such, any purported change of such ownership or control would need to comply with the New BGM Charter and New BGM Bylaws, including the BGM Ownership Limitation and the BGM Voting Limitation (or a Commission-approved waiver therefrom).

The proposed BGM Holdings Charter further specifies that nothing contained therein or in the BGM Holdings Bylaws shall be applicable where the application of the provision would interfere with the effectuation of any and all decisions relating to the regulatory functions of the BATS Exchanges (including disciplinary matters) or the structure of the market that each BATS Exchange regulates, or would interfere with the ability of each BATS Exchange to carry out its responsibilities under the Act or oversee the market that each regulates.[59]

In addition, the proposed BGM Holdings Charter provides that for so long as BGM Holdings controls, directly or indirectly, a registered national securities exchange, before any amendment to or repeal of any provision of the BGM Holdings Charter may be effective, those changes shall be submitted to the board of directors of each such exchange, and if the same must be filed with, or filed with and approved by, the Commission before the changes may be effective under Section 19 of the Act [60] and the rules promulgated thereunder, then such proposed changes shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.[61]

b. BGM Holdings Bylaws

The proposed BGM Holdings Bylaws, attached as Exhibit 5E, contain several provisions designed to protect the independence of the self-regulatory functions of the BATS Exchanges. The proposed BGM Holdings Bylaws require that, for so long as BGM Holdings, directly or indirectly, controls a BATS Exchange, BGM Holdings' board of directors, officers, employees and agents must give due regard to the preservation of independence of the self-regulatory functions of each BATS Exchange and not interfere with the effectuation of any decisions by either of the BATS Exchange boards of directors relating to its regulatory functions (including disciplinary matters) or which would interfere with the ability of such exchange to carry out its responsibilities under the Act.[62] The BGM Holdings Bylaws would further require that BGM Holdings comply with the U.S. federal securities laws and rules and regulations thereunder and shall cooperate with the Commission and each BATS Exchange, as applicable, pursuant to and to the extent of their respective regulatory authority.[63] Pursuant to the BGM Holdings Bylaws, BGM Holdings' officers, directors, employees and agents shall be deemed to agree to (i) comply with the U.S. federal securities laws and the rules and regulations thereunder; and (ii) to cooperate with the Commission and each BATS Exchange in respect of the Commission's oversight responsibilities regarding the BATS Exchanges and their self-regulatory functions and responsibilities of the BATS Exchanges, and BGM Holdings will take reasonable steps to cause its officers, directors, employees and agents to so cooperate.[64]

Furthermore, BGM Holdings and its officers, directors, employees and agents will be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and each BATS Exchange, as applicable, for purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws or the rules or regulations thereunder arising out of, or relating to, the activities of such exchange.[65]

The proposed BGM Holdings Bylaws also contain a number of provisions designed to ensure that the BATS Exchanges have sufficient access to the books and records of BGM Holdings. Pursuant to the BGM Holdings Bylaws, the books, records, premises, officers, directors, agents, and employees of BGM Holdings are deemed to be the books, records, premises, officers, directors, agents and employees of the BATS Exchanges to the extent they are related to the operation or administration of such exchange.[66] In addition, for as long as BGM Holdings controls, directly or indirectly, the BATS Exchanges, BGM Holdings' books and records shall be subject at all times to inspection and copying by the Commission and the BATS Exchanges, provided that such books and records are related to the operation or administration of the BATS Exchanges.[67]

The proposed BGM Holdings Bylaws also provide that, to the fullest extent permitted by law, all books and records of the BATS Exchanges reflecting confidential information pertaining to the self-regulatory function of such exchange (including disciplinary matters, trading data, trading practices and audit information) that comes into the possession of BGM Holdings, shall be retained in confidence by BGM Holdings and its stockholders, board of directors, officers, employees and agents, and not be used for any non-regulatory purposes.[68] The proposed BGM Holdings Bylaws provide, however, that the foregoing shall not limit or impede the rights of the Commission or the BATS Exchanges to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or limit or impede the ability of any BGM Holdings stockholders, officers, directors, employees or agents to disclose such confidential information to the Commission or either BATS Exchange.[69]

With respect to the election of directors of the BATS Exchanges, Current BGM is currently the sole and direct stockholder of each of the BATS Exchanges. As noted above, while

[56] 15 U.S.C. 78f(b).

[57] 15 U.S.C. 78s(g).

[58] *See* BGM Holdings Charter, Art. SEVENTH, para. 4.

[59] *See* BGM Holdings Charter, Art. FIFTH, para. 2.

[60] 15 U.S.C. 78s(b).

[61] *See* BGM Holdings Charter, Art. SEVENTH, para. 3.

[62] *See* BGM Holdings Bylaws, Section 7.1.

[63] *See* BGM Holdings Bylaws, Section 7.2.

[64] *Id.*

[65] *See* BGM Holdings Bylaws, Section 7.3.

[66] *See* BGM Holdings Bylaws, Section 5.8(b).

[67] *Id.*

[68] *See* BGM Holdings Bylaws, Section 5.8(a).

[69] *Id.*

Current BGM will become BGM Holdings, it will continue to hold the direct ownership interest and voting rights in the BATS Exchanges. Therefore, the BGM Holdings Bylaws are proposed to maintain provisions relating to its voting of its interests in the BATS Exchanges that are substantially identical to those contained in the Current BGM Bylaws.[70] In particular, the proposed BGM Holdings Bylaws would continue to provide that at any meeting of the stockholders of either BATS Exchange held for the purpose of electing directors and members of such exchange's Member Nominating Committee, or in the event written consents are solicited or otherwise sought from the stockholders of such BATS Exchange with respect thereto, BGM Holdings will cause all outstanding shares of the BATS Exchange owned by BGM Holdings to be voted in favor of only those Member Representative Directors and nominees for the Member Nominating Committee nominated in accordance with such exchange's bylaws, and, with respect to any written consents, BGM Holdings will only cause to be validly executed written consents electing such directors and members of the Member Nominating Committee.[71] The Exchange believes that this requirement will ensure that BGM Holdings effectuates the election of directors and members of the Exchange's Member Nominating Committee in the manner contemplated by the Exchange's Bylaws, ensuring the fair representation of members in the selection of directors and the administration of the Exchange as required by Section 6(b)(3) of the Act.[72]

Similar to the proposed BGM Holdings Charter, the proposed BGM Holdings Bylaws provide that for so long as BGM Holdings controls either BATS Exchange, before any amendment to or repeal of any provision of the BGM Holdings Bylaws will be effective, those changes must be submitted to the board of directors of each BATS Exchange, and if the same must be filed with, or filed with and approved by, the Commission before the changes may be effective under Section 19 of the Act,[73] and the rules promulgated thereunder, then the proposed changes shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.[74]

Lastly, while as noted above, the BGM Holdings Bylaws are modeled on the current bylaws of DEI (the ''DEI Bylaws''), in contrast with the current DEI Bylaws, the proposed BGM Holdings Bylaws do not contain a provision relating to BGM Holdings' handling of funds derived from the regulatory operations of its exchange subsidiaries (such as regulatory fees, fines and penalties). The Exchange Bylaws and the bylaws of BYX each prohibit the Exchange and BYX, respectively, from distributing any such funds to its stockholder, instead requiring that such funds only be applied to fund the legal and regulatory operations of the respective exchange or pay restitution and disgorgement of funds intended for customers.[75] As a result, BGM Holdings will not be permitted to come into possession of regulatory funds, as they will remain at the respective exchange and used only for permitted purposes. The Exchange therefore believes that including a provision in the BGM Holdings Bylaws relating to the handling by BGM Holdings of such funds is unnecessary and potentially confusing. The Exchange understands that the DE Exchanges are each proposing to amend DEI's bylaws to eliminate the corresponding provision.[76]

7. Bylaws of the Exchange

In connection with the Combination, the Exchange proposes to amend and restate its Second Amended and Restated By-Laws and adopt the amended Exchange Bylaws as its Third Amended and Restated Bylaws, attached as Exhibit 5F. The Exchange proposes making the following amendments to the Exchange Bylaws:

- Amending Article I, paragraph (cc) of the Exchange Bylaws to reflect the change of name of the Exchange's stockholder from Current BGM to BGM Holdings. This amendment is intended to reflect the change in the Exchange's corporate holding structure and corporate name changes described above as well as prevent any change of ownership of the Exchange other than in accordance with the requirements set forth in the organizational documents of the Exchange's parent and indirect parent companies.
- Amending Section 2(b) and Section 3(b) of Article III of the Exchange Bylaws to clarify that the Chief Executive Officer of the Exchange is considered to be an Industry Director, but is excluded from being designated as a member of one of the three classes of directors for purposes of the Board's staggered three-year terms. This amendment is meant to clarify, rather than change, current practice. The Exchange Bylaws require that the Board of Directors be composed of one Director who is the Chief Executive Officer of the Exchange, and a sufficient number of Non-Industry Directors (including Independent Directors), Industry Directors and Member Representative Directors such that (i) the number of Non-Industry Directors, including at least one Independent Director, equals or exceeds the sum of the number of Industry Directors and Member Representative Directors, and (ii) the number of Member Representative Directors equals at least 20 percent of the Board of Directors (the ''Exchange Board Composition Requirements'').[77] Because the definition of ''Industry Director'' includes a Director that has an employment relationship with the Exchange,[78] the Chief Executive Officer of the Exchange will always meet the definition of ''Industry Director.'' Consistent with this definition, and in order to effectuate the Exchange Board Composition Requirements, the Exchange considers the Chief Executive Officer to be an Industry Director. Were the Chief Executive Officer to not be considered for purposes of determining composition of the board, the total number of persons affiliated with the securities industry (including Industry Directors, Member Representative Directors and the Chief Executive Officer) could potentially exceed the number of Non-Industry Directors—a result that the Exchange believes the Exchange Board Composition Requirements were intended to prevent. The Exchange therefore proposes to amend Section 2(b) of Article III of the Exchange Bylaws to explicitly clarify that the Chief Executive Officer shall be considered to be an Industry Director. The Exchange Bylaws separately provide that each of the Non-Industry Directors and Industry Directors are divided into one of three classes to serve staggered three-year terms.[79] Unlike other Industry Directors, rather than serving a three-year term, the Chief Executive Officer of the Exchange serves on the Board of Directors until he or she ceases to be Chief Executive Officer.[80]

[70] *Compare* BGM Holdings Bylaws, Sections 2.15(b) and (c) *with* Current BGM Bylaws, Sections 5.02(b) and (c).

[71] *See* BGM Holdings Bylaws, Sections 2.15(b) and (c).

[72] 15 U.S.C. 78f(b)(3).

[73] 15 U.S.C. 78s.

[74] *See* BGM Holdings Bylaws, Section 6.4.

[75] *See e.g.,* Exchange Bylaws, Art. X, Section 4.

[76] *See* DEI Bylaws, Section 4.6(b).

[77] *See* Exchange Bylaws, Art. III, Section 2(b).

[78] *See* Exchange Bylaws, Art. I, para. (o)(vi).

[79] *See* Exchange Bylaws, Art. III, Section 3(b).

[80] *See* Exchange Bylaws, Art. III, Section 3(a).

The Exchange is therefore proposing to amend Section 3(b) of Article III of the Exchange Bylaws to explicitly clarify that the reference to each Industry Director serving a staggered three-year term excludes the Chief Executive Officer.

• Amending Section 4(a), Section 4(c) and Section 4(e) of Article III of the Exchange Bylaws to permit the Director nomination and election process (including the Member Representative Director nomination and election process conducted by the Member Nominating Committee) to be conducted through either an annual or special meeting of stockholders, rather than solely through an annual meeting of stockholders. Under the current Exchange Bylaws, should one or more vacancies on the Board of Directors occur, the vacancies would continue until they can be filled at an annual meeting. As a result, vacancies that arise soon after an annual meeting could remain for close to a full year. The Exchange therefore proposes to amend the Exchange Bylaws to add flexibility to the governance process around the nomination and election of a Director position that may become vacant at a time that does not coincide with the Exchange's annual director election process, by permitting the process to occur at any time via a special meeting of stockholders.

• Amending Section 2(a) of Article V of the Exchange Bylaws to clarify that the Chairman, with the approval of the Board, not only appoints the members of all committees of the Board, but also the chair of each committee. This amendment is intended to reflect the current committee and committee Chair appointment processes utilized by the Exchange.

• Amending Section 6(c) of Article V of the Exchange Bylaws to clarify that the Regulatory Oversight Committee responsibilities include (i) those with regard to each of the Exchange's facilities, as defined in Section 3(a)(2) of the Act,[81] (ii) assessing the Exchange's regulatory performance, (iii) assisting the Board and committees of the Board in reviewing the regulatory plan and the overall effectiveness of the Exchange's regulatory functions, and (iii) in consultation with the Chief Executive Officer of the Exchange, establishing the goals, assessing the performance, and fixing the compensation of the Chief Regulatory Officer of the Company. These amendments are intended to reflect the current responsibilities of the Regulatory Oversight Committee.

[81] 15 U.S.C. 78c(a)(2).

• Deleting as outdated Section 1 of Article XI of the Exchange Bylaws, relating to the interpretation of the Exchange Bylaws prior to the Exchange's commencement of business as a national securities exchange, and renumbering the remaining sections within Article XI accordingly.

• Expanding the prohibition contained in Section 3 of Article XI of the Exchange Bylaws (to be renumbered as Section 2). Currently, Section 3 of Article XI prohibits Current BGM's directors, officers, staff, counsel and advisors who are not also directors, officers, staff, counsel or advisors of the Exchange from participating in any meetings of the Exchange's Board of Directors (or any committee thereof) pertaining to the self-regulatory function of the Exchange (including disciplinary matters). Because, following the Combination, the Exchange will be owned directly by BGM Holdings and indirectly by New BGM, instead of only directly by Current BGM, the Exchange is proposing to expand this prohibition to cover both its direct and indirect parent companies. The Exchange believes that this amendment will protect the independence of the Exchange's self-regulatory activities.

• Correcting certain typographical errors, including conforming the spelling of ''Bylaws'' throughout the organizational documents of the Exchange and its parent companies.

8. Exchange Rule 2.3—Member Eligibility

Pursuant to Exchange Rule 2.3, in order to be eligible for membership in the Exchange, a registered broker or dealer is required to be a member of at least one other national securities association or national securities exchange. However, membership in the Exchange's affiliated national securities exchange, BYX, is not sufficient for purposes of eligibility for Exchange membership. As a result of the Combination, the Exchange will additionally become affiliated with the DE Exchanges. The Exchange continues to believe that it is appropriate to limit its membership to registered broker-dealers that are members of at least one national securities association or national securities exchange that is not affiliated with the Exchange. Therefore, the Exchange proposes to amend Exchange Rule 2.3 to specify that a registered broker-dealer will be eligible for membership only if it is a member of a national securities association or national securities exchange other than BYX, EDGA or EDGX. The proposed amendments to Exchange Rule 2.3 are set forth in Exhibit 5G.

9. Exchange Rule 2.12—DE Route as Inbound Router

BATS Trading provides Members of the Exchange and BYX with optional routing services to other market centers. Thus, in certain circumstances, BATS Trading provides inbound routing from BYX to the Exchange. Exchange Rule 2.12 governs this inbound routing of orders by BATS Trading to the Exchange in BATS Trading's capacity as a facility of BYX. Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange has implemented limitations and conditions on BATS Trading's affiliation with the Exchange in order to permit the Exchange to accept inbound orders that BATS Trading routes in its capacity as a facility of BYX. These conditions and limitations, set forth in Exchange Rule 2.12, require that:

(1) The Exchange must enter into (a) a plan pursuant to Rule 17d–2 under the Act with a non-affiliated self-regulatory organization (''SRO'') to relieve the Exchange of regulatory responsibilities for BATS Trading with respect to rules that are common rules between the Exchange and the non-affiliated SRO, and (b) a regulatory services contract (''Regulatory Contract'') with a non-affiliated SRO to perform regulatory responsibilities for BATS Trading for unique Exchange rules.

(2) The Regulatory Contract must require the Exchange to provide the non-affiliated SRO with information, in an easily accessible manner, regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively ''Exceptions'') in which BATS Trading is identified as a participant that has potentially violated Exchange or Commission Rules, and requires that the non-affiliated SRO provide a report, at least quarterly, to the Exchange quantifying all Exceptions in which BATS Trading is identified as a participant that has potentially violated Exchange or Commission rules.

(3) The Exchange, on behalf of its parent company, must establish and maintain procedures and internal controls reasonably designed to ensure that BATS Trading does not develop or implement changes to its system based on non-public information obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Members of the Exchange.

(4) The Exchange may furnish to BATS Trading only the same information and on the same terms as the Exchange makes available in the normal course of business to other users.[82]

Similar to the role of BATS Trading with respect to the BATS Exchanges, the Exchange understands that DE Route provides members of the DE Exchanges with optional routing services to other market centers, which may include routing from a DE Exchange to the Exchange. Following the Combination, it is expected that DE Route will continue to provide these routing services, which may involve routing to the Exchange. Because, following the Combination, DE Route will be affiliated with and potentially routing to the Exchange, the Exchange believes that the potential conflict of interest currently addressed by Exchange Rule 2.12 with respect to BATS Trading must also be addressed with respect to DE Route.

The Exchange is therefore proposing to amend and expand Exchange Rule 2.12 such that substantially the same conditions and limitations that currently apply to the inbound routing of orders by BATS Trading apply to the inbound routing of orders by DE Route. The proposed amendments to Exchange Rule 2.12, as set forth in Exhibit 5H, would provide that, in order for the Exchange to accept inbound routed orders from DE Route, the conditions and limitations currently set forth in Exchange Rule 2.12 with respect to BATS Trading must also be satisfied with respect to DE Route.

The Exchange believes that these proposed amendments will adequately manage the potential for a conflict of interest that could arise from DE Route routing orders to the Exchange. The Exchange expects to arrange that these conditions be met prior to the Closing so as to allow DE Route to continue routing to the Exchange following the Closing without interruption.[83]

In addition, the language in Exchange Rule 2.12 leading into the four conditions described above incorrectly refers to the conditions being undertaken by ''each of the Exchange and BATS Trading.'' However, by their terms, the conditions contained in Exchange Rule 2.12 are undertaken only by the Exchange and, in one case, the Exchange on behalf of its parent company. The Exchange therefore proposes to delete the incorrect reference to BATS Trading.

10. Exchange Rule 2.10—Affiliation With DE Route

Exchange Rule 2.10 provides that, subject to certain exceptions, without the prior approval of the Commission, (i) the Exchange or any entity with which the Exchange is affiliated (as defined in Rule 12b–2 under the Act), may not directly or indirectly acquire or maintain an ownership interest in a Member of the Exchange, and (ii) a Member of the Exchange may not be or become an affiliate of the Exchange, or an affiliate of any affiliate of the Exchange.

DE Route is currently a Member of the Exchange. As a result of the Combination, (i) New BGM, an entity affiliated with the Exchange, will acquire and maintain an indirect ownership interest in DE Route, and (ii) DE Route will become an affiliate of the Exchange. Pursuant to Exchange Rule 2.10, the Exchange is seeking the Commission's prior approval to permit this affiliation.

The Exchange notes that the purpose of Exchange Rule 2.10 is to prevent or manage potential conflicts of interest that could arise from the Exchange or its affiliates having an ownership interest in an Exchange Member, particularly with respect to the Exchange's obligation under Section 19(g) of the Act to enforce its Members' compliance with the Act, the Commission's rules thereunder, and Exchange Rules.[84]

The Exchange believes that it should be permitted to become affiliated with DE Route, notwithstanding DE Route's Exchange membership. As described above, as a result of the proposed amendments to Exchange Rule 2.12, the Exchange intends on addressing the potential conflicts of interests arising from its expected affiliation with DE Route by, among other things, entering into (i) a plan pursuant to Rule 17d–2 under the Act with a non-affiliated SRO to relieve the Exchange of regulatory responsibilities for DE Route with respect to rules that are common rules between the Exchange and the non-affiliated SRO, and (ii) a Regulatory Contract with a non-affiliated SRO to perform regulatory responsibilities for DE Route for unique Exchange rules. The Exchange believes that any potential conflict of interest that would arise as a result of its affiliation with DE Route will be mitigated by the same procedures that the Exchange anticipates adopting to satisfy the proposed amendments to Exchange Rule 2.12. The Exchange therefore requests that, pursuant to Exchange Rule 2.10, the Commission approve the indirect acquisition of DE Route by an affiliate of the Exchange and the resulting affiliation between the Exchange and DE Route, so long as the requirements under Exchange Rule 2.12, as proposed to be amended, are satisfied.

2. Statutory Basis

The Exchange believes that the Proposed Rule Change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[85] In particular, the proposal is consistent with Section 6(b)(1) of the Act[86] in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the Rules of the Exchange. The Proposed Rule Change is designed to enable the Exchange to continue to have the authority and ability to effectively fulfill its self-regulatory duties pursuant to the Act and the rules promulgated thereunder. In particular, the Proposed Rule Change includes in the New BGM Charter and New BGM Bylaws, like the Current BGM Charter and Current BGM Bylaws, various provisions intended to protect and maintain the integrity of the self-regulatory functions of the Exchange upon Closing. For example, the New BGM Bylaws, as described above, are drafted to preserve the independence of the Exchange's self-regulatory function and ensure that the Exchange is able to obtain information it needs from the specified parties to detect and deter any fraudulent and manipulative acts in its marketplace and carry out their regulatory responsibilities under the Act. In addition, the New BGM Charter and New BGM Bylaws are drafted to make sure that the Exchange's Board of Directors receives notice of any amendment to the New BGM Charter and New BGM Bylaws so that the Exchange's Board of Directors may review and approve, and the Exchange may make any filings with the Commission necessary for the Exchange to fulfill its regulatory duties under the Act. The New BGM Charter also imposes the BGM Ownership Limitation

[82] *See* Securities Exchange Act Release No. 66571 (March 12, 2012), 77 FR 15153 (March 14, 2012) (SR–BATS–2012–013).

[83] If such conditions and limitations are not satisfied by Closing, the Exchange will not accept inbound orders from DE Route until such conditions and limitations are satisfied.

[84] 15 U.S.C. 78s(g).

[85] 15 U.S.C. 78f(b).

[86] 15 U.S.C. 78f(b)(1).

and BGM Voting Limitation to preclude undue influence over or interference with the Exchange's self-regulatory functions and fulfillment of its regulatory duties under the Act.

Moreover, notwithstanding the Proposed Rule Change, including the change to the ownership structure of the Exchange, the Commission will continue to have regulatory authority over the Exchange, as is currently the case, as well as jurisdiction over the Exchange's direct and indirect parents with respect to activities related to the Exchange.[87] As a result, the Proposed Rule Change will facilitate an ownership structure that will provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Act with respect to the Exchange, its direct and indirect parent entities and their directors, officers, employees and agents to the extent they are involved in the activities of the Exchange.

The Exchange also believes that the Proposed Rule Change furthers the objectives of Section 6(b)(5) of the Act[88] because the Proposed Rule Change would be consistent with and facilitate a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

In addition, the Exchange expects that the Combination will facilitate efficiencies and innovation for clients and efficient, transparent and well-regulated markets for issuers and clients, thus removing impediments to, and perfecting the mechanism of a free and open market and a national market system. The Combination will benefit investors, the market as a whole, and shareholders by, among other things, enhancing competition among securities venues and reducing costs. In particular, the Combination will result in a third major exchange operator which will have more streamlined and efficient operations, including the transition of the DE Exchanges to a technology platform in common with the BATS Exchanges, thereby intensifying competition for transaction order flow with other exchange and non-exchange trading centers, as well as potentially in other areas where the two major exchange operators lead, such as proprietary market data products and listings. This enhanced level of competition among trading centers will benefit investors through new or more competitive product offerings and, ultimately, lower costs.

Furthermore, the Exchange is not proposing any significant changes to its existing operational and trading structure in connection with the change in ownership; the Exchange will operate in essentially the same manner upon Closing as it operates today. Therefore, the Exchange believes that it will continue to satisfy the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange. The changes the Exchange is proposing to Exchange Rules 2.3 are designed to extend the membership eligibility criteria in a way that is consistent with the current rule, taking into account the prospective affiliation with the DE Exchanges. The proposed change to Exchange Rule 2.12 is designed to address the potential for conflicts of interest due to the prospective affiliation between the Exchange and DE Route. The Exchange believes that the proposed change to its Rules is consistent with the requirements of the Act and the rules and regulations thereunder. The Exchange believes that the rule change promotes the maintenance of a fair and orderly market, the protection of investors and the public interest, and is in the best interests of the Exchange and its Members as it would continue to allow routing of orders between the four affiliated exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the Proposed Rule Change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Indeed, the Exchange believes that the Proposed Rule Change will enhance competition among intermarket trading venues, as the Exchange believes that the Combination will produce a stronger and more efficient entity that will have an improved ability to provide innovative products and services. Moreover, the Exchange will continue to conduct regulated activities (including operating and regulating its market and Members) of the type it currently conducts, but will be able to do so in a more efficient manner to the benefit of its Members. Furthermore, the Exchange's conclusion that the Proposed Rule Change would not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act is consistent with the Commission's prior conclusions about similar combinations involving multiple exchanges in a single corporate family.[89]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BATS–2013–059 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

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[87] *See, e.g.,* New BGM Bylaws, Section 14.05; BGM Holdings Bylaws, Section 7.3.

[88] 15 U.S.C. 78f(b)(5).

[89] *See, e.g.,* Securities Exchange Act Release No. 66071 (December 29, 2011), 77 FR 521 (January 05, 2012) (SR–CBOE–2011–107 and SR–NSX–2011–14); Securities Exchange Act Release No. 58324 (Aug. 7, 2008), 73 FR 46936 (August 12, 2008) (SR–BSE–2008–02; SR–BSE–2008–23; SR–BSE–2008–25; SR–BSECC–2008–01); Securities Exchange Act Release No. 53382 (Feb. 27, 2006), 71 FR 11251 (March 06, 2006) (SR–NYSE–2005–77).

All submissions should refer to File Number SR–BATS–2013–059. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BATS–2013–059, and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[90]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–29622 Filed 12–11–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71013; File No. SR–NASDAQ–2013–148]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend the Restated Certificate of Incorporation and By-Laws of The NASDAQ OMX Group, Inc.

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 27, 2013, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing this proposed rule change with respect to amendments of the Restated Certificate of Incorporation (the ''Charter'') and By-Laws (the ''By-Laws'') of its parent corporation, The NASDAQ OMX Group, Inc. (''NASDAQ OMX'' or the ''Company''). The proposed amendments will be implemented on a date designated by NASDAQ OMX following approval by the Commission. The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ OMX is proposing to make certain amendments to its Charter and By-Laws.

(i) Background

At NASDAQ OMX's 2012 annual meeting held on May 22, 2012, NASDAQ OMX's stockholders considered two proposals submitted by individual stockholders. The first proposal, which passed with 68% of the votes cast, requested that NASDAQ OMX's Board take steps to replace each supermajority voting standard in the Charter and By-Laws[3] with a voting standard requiring a ''majority of votes cast.'' The second proposal, which did not pass but received 49% of the votes cast, requested that NASDAQ OMX's Board take steps to enable stockholders having at least one-tenth of NASDAQ OMX's voting power to call a special meeting of stockholders.

Following the 2012 annual meeting, the Nominating & Governance Committee of NASDAQ OMX's Board reviewed the voting results on the two stockholder proposals and discussed the stockholder voting standards and rights contemplated by the Charter and By-Laws. Following this review, the Nominating & Governance Committee recommended to the Board, and the Board approved, certain changes to the Charter and By-Laws to address the two stockholder proposals and make other changes. NASDAQ OMX now proposes to make these changes, which are described further below.

(ii) Proposed Amendments to Charter

(a) Removal and Replacement of Supermajority Voting Requirements

To respond to feedback from its stockholders, NASDAQ OMX proposes to replace each supermajority voting requirement in the Charter with a ''majority of outstanding shares'' voting requirement. The Charter currently includes the following three supermajority voting requirements.

• *Removal of Directors.* Article Fifth, Paragraph D provides that, except for directors elected by the holders of any series of preferred stock, any director, or the entire Board, may be removed from office at any time, but only by the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors (the ''Voting Stock''), voting together as a single class.

• *Adoption, Alteration, Amendment and Repeal of By-Laws.* Article Eighth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the total voting power of the outstanding Voting Stock, voting together as a single class, shall be required in order for the stockholders to adopt, alter, amend or repeal any By-Law.

• *Adoption, Alteration, Amendment and Repeal of Certain Charter Provisions.* Article Ninth, Paragraph A provides that the affirmative vote of the

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[90] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] These provisions, which are described further below, require the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock to approve certain actions.

holders of at least 66⅔% of the voting power of the outstanding Voting Stock, voting together as a single class, shall be required to amend, repeal or adopt any provision inconsistent with paragraph C of Article Fourth,[4] Article Fifth,[5] Article Seventh,[6] Article Eighth [7] or Article Ninth of the Charter.[8]

In each of the three provisions described above, NASDAQ OMX proposes to remove the requirement for an affirmative vote of at least 66⅔% of the total voting power of the Voting Stock and replace it with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock. In developing this proposal, NASDAQ OMX considered the relative weight of the arguments for and against supermajority voting requirements. Historically, supermajority voting requirements have protected corporations against coercive takeover tactics by requiring broad stockholder support for certain types of transactions or governance changes. However, in recent years, corporate governance standards have evolved, and many stockholder rights advocates argue that supermajority voting requirements limit stockholders' participation in corporate governance. NASDAQ OMX believes that while it is important to protect against coercive takeover tactics, it is also critically important to obtain stockholder input and respond to stockholder concerns about corporate governance.

NASDAQ OMX believes that the proposed "majority of outstanding shares" voting requirement will continue to provide some protection against proposals that are harmful to the stockholders. While this requirement is less difficult to satisfy than a supermajority voting requirement, it is more difficult to satisfy than a "majority of votes cast" requirement, which NASDAQ OMX considered as an alternate option. NASDAQ OMX believes that a "majority of outstanding shares" standard is a balanced outcome that responds to stockholder feedback while appropriately maintaining NASDAQ OMX's defensive posture against hostile takeovers.

(b) Non-Substantive Changes

NASDAQ OMX also proposes to amend and restate the Charter to make other non-substantive changes. Specifically, the proposal deletes obsolete references to the following:

- The 3.75% Series A Convertible Notes due 2012 and the 3.75% Series B Convertible Notes due 2012, which are no longer outstanding, in Article Fourth, Paragraph C and Article Eleventh;
- a voting trust agreement, which is no longer in effect, in Article Fourth, Paragraph C(3)(b)(iii);
- ownership of NASDAQ OMX securities by the National Association of Securities Dealers, Inc., certain affiliates of Hellman & Friedman LLC, and certain affiliates of Silver Lake, none of which currently own any NASDAQ OMX securities, in Article Fourth, Paragraph C(6); [9] and
- the phase-out of the classified board structure, which was complete in 2007, in Article Fifth, Paragraph B.

In Article Fifth, Paragraph B, the proposal also clarifies that the election of directors by stockholders shall occur at an annual or special meeting. The proposal corrects a typographical error in Article Fifth, Paragraph A and renumbers the provisions of the Charter, where necessary following the other amendments. Finally, the proposal amends the introductory and concluding language of the Charter to incorporate language that will be required under Delaware law when the amended and restated Charter is filed with the Secretary of State of the State of Delaware.[10]

The amendment and restatement of the Charter to incorporate these non-substantive changes will simplify and streamline the document.

(iii) Proposed Elimination of Certificate of Designation

NASDAQ OMX proposes to eliminate its Certificate of Designation, Preferences and Rights of Series A Convertible Preferred Stock (the "Series A Convertible Preferred Stock"), and all matters set forth therein. The Series A Convertible Preferred Stock was created in 2009 to facilitate the conversion of certain notes into common stock.[11] The Company authorized 2 million shares of the Series A Convertible Preferred Stock and immediately issued 1.6 million of those shares to the converting noteholders.

In 2010, following stockholder approval, all 1.6 million issued shares of the Series A Convertible Preferred Stock were converted into common stock. Since then, no shares of the Series A Convertible Preferred Stock have been outstanding, and the Company has no intention to issue further shares of this series.

As a clean-up matter, the Company seeks to file a certificate of elimination with the Secretary of State of the State of Delaware to eliminate the Series A Convertible Preferred Stock. Under Delaware law, a certificate of elimination is deemed to be an

[4] Paragraph C of Article Fourth sets forth the 5% voting limitation, which provides that holders of NASDAQ OMX's voting securities may not cast votes in excess of 5% of NASDAQ OMX's outstanding voting securities. To be clear, NASDAQ OMX is not proposing any change to the 5% voting limitation itself. NASDAQ OMX only proposes that any future amendment of the 5% voting limitation will require the approval of stockholders holding a majority of the outstanding shares, rather than stockholders holding 66⅔% of the outstanding shares.

[5] Article Fifth includes certain provisions relating to the Board, such as Board size and director elections.

[6] Article Seventh prohibits stockholder action by written consent.

[7] Article Eighth establishes the procedures to adopt, alter, amend or repeal the By-Laws.

[8] Article Ninth establishes the procedures to adopt, alter, amend or repeal the Charter.

[9] NASDAQ OMX notes that the remaining text of Article Fourth, Paragraph C(6) of the Charter includes an obsolete cross-reference to Section 6(b) of Article Fourth, Paragraph C in the second sentence, which begins "The Board, however, may not approve an exemption under Section 6(b). . . ." NASDAQ OMX cannot correct this cross-reference, which should refer to Section 6 without further reference to a subsection (b), without seeking further approval of its stockholders, which would require NASDAQ OMX to call and hold a stockholder meeting. Generally, NASDAQ OMX holds stockholder meetings, which are time consuming and expensive, only once or twice a year. Moreover, it is atypical of a large public company like NASDAQ OMX to submit a proposal to its stockholders solely to correct a cross-reference in its Charter. However, NASDAQ OMX believes, following consultation with outside counsel, that it is clear, based on the drafting history of this provision, that the intent of the cross-reference is to refer to Section 6 of Article Fourth, Paragraph C of the Charter. In other words, the second sentence of Article Fourth, Paragraph C(6) should read: "The Board, however, may not approve an exemption under Section 6: (i) for a registered broker or dealer or an Affiliate thereof or (ii) an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act." Under no circumstances will NASDAQ OMX read the obsolete cross-reference to imply that the Board could grant an exemption to the ownership limitation in Article Fourth, Paragraph C(6) of the Charter for a registered broker or dealer or an Affiliate thereof, or an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act. NASDAQ OMX also notes that it is proposing amendments to Section 12.5 of the By-Laws to eliminate cross-references to subsection (b) of Article Fourth, Paragraph C(6) of the Charter. Finally, NASDAQ OMX notes that there are some differences in language between the second sentence of Article Fourth, Paragraph C(6) of the Charter and the second sentence of Section 12.5 of the By-Laws. To the extent that these differences would cause a difference in interpretation, NASDAQ OMX notes, following consultation with outside counsel, that the Charter language shall prevail. As soon as feasible, NASDAQ OMX plans to present a proposal to the stockholders to conform this provision of the Charter to the By-Laws.

[10] *See* Sections 242 and 245 of the DGCL.

[11] *See* Securities Exchange Act Release No. 60845 (October 20, 2009), 74 FR 55078 (October 26, 2009) (SR–BX–2009–061, SR–NASDAQ–2009–087, SR–Phlx–2009–88); *see also* Securities Exchange Act Release No. 61000 (November 13, 2009), 74 FR 61390 (November 24, 2009) (SR–BSECC–2009–005); *see also* Securities Exchange Act Release No. 61001 (November 13, 2009), 74 FR 61391 (November 24, 2009) (SR–SCCP–2009–04).

amendment to NASDAQ OMX's Charter; however, since the amendment is limited in scope, it does not require the approval of NASDAQ OMX's stockholders.[12]

(iv) Proposed Amendments to the By-Laws

(a) Special Meetings of Stockholders

Current Section 3.2 of NASDAQ OMX's By-Laws provides that only NASDAQ OMX may call special meetings of its stockholders.[13] To respond to feedback from its stockholders, as discussed above, NASDAQ OMX proposes to delete this provision and replace it with language that will allow NASDAQ OMX's stockholders to call special meetings after following particular procedures. Similar to the elimination of supermajority voting requirements, which is discussed above, the implementation of the right of stockholders to call a special meeting has received recent attention from investor and corporate governance advocates. These advocates argue that such a right will enable stockholders to raise and act on matters that arise between annual meetings.

Following discussions with some of its stockholders, NASDAQ OMX agrees that it is appropriate to allow stockholders who meet certain procedural requirements to call a special meeting. In proposing these procedural requirements, NASDAQ OMX's goals are to ensure timely notice of a meeting request and to gather sufficient information about the proposing stockholder(s) and the proposal. Among other things, this information will ensure that NASDAQ OMX is able to comply with its disclosure and other requirements under applicable law and that NASDAQ OMX, its Board and its stockholders are able to assess the proposal adequately. The proposed procedural requirements are set forth below.

First, proposed Section 3.2(a) provides that special meetings of NASDAQ OMX's stockholders may only be called: (i) At any time by NASDAQ OMX's Board pursuant to a resolution adopted by a majority of the total number of directors NASDAQ OMX would have if there were no vacancies; and (ii) by NASDAQ OMX's Corporate Secretary following the receipt of a written request in proper form for a special meeting (a ''Special Meeting Request'') by one or more stockholders. Such stockholders (the ''Requisite Holders'') must hold of record, in the aggregate, at least 15 percent of NASDAQ OMX's outstanding shares of capital stock entitled to vote on matters to be brought before the special meeting (the ''Requisite Percentage''). Such shares must be ''Net Long Shares,''[14] and the Requisite Holders must have held the shares continuously for at least one year as of the date of the Special Meeting Request. Whether shares constitute Net Long Shares shall ultimately be decided by NASDAQ OMX's Board in its reasonable determination. The intent of the requirement for stockholders to maintain a ''net long position'' is to limit the ability to call a special meeting to stockholders that have long-term record and economic positions in NASDAQ OMX.

Proposed Section 3.2(a) also sets forth the procedures for determining whether a special meeting has been requested by Requisite Holders representing in aggregate at least the Requisite Percentage if multiple Special Meeting Requests are delivered to NASDAQ OMX's Corporate Secretary. Multiple requests will be considered together only if: (i) Each Special Meeting Request identifies substantially the same purpose or purposes of the special meeting and substantially the same matters proposed to be acted on at the requested special meeting (in each case as determined in good faith by NASDAQ OMX's Board); and (ii) such Special Meeting Requests have been dated and delivered to NASDAQ OMX's Corporate Secretary within 60 days of the earliest dated Special Meeting Request. NASDAQ OMX believes these procedures are reasonable and clear and notes that they grant only limited discretion to NASDAQ OMX's Board in determining whether Special Meeting Requests will be considered together.

Pursuant to proposed Section 3.2(b), if a Special Meeting Request is in proper form, NASDAQ OMX's Board shall determine the place, if any, date and time of the special meeting, and NASDAQ OMX's Corporate Secretary shall call the special meeting within 120 days after the date the Special Meeting Request was delivered. However, NASDAQ OMX's Board may, in lieu of calling a special meeting, present an identical or substantially similar item of business (a ''Similar Item''),[15] as determined in good faith by NASDAQ OMX's Board, for stockholder approval at any other meeting of the stockholders that is held not less than 120 days after the delivery of the Special Meeting Request. The intent of this provision is to save NASDAQ OMX the time and expense of calling and holding a special meeting if NASDAQ OMX intends to hold a separate stockholders' meeting within 120 days. In fixing the place, if any, date and time for any special meeting, NASDAQ OMX's Board may consider such factors as it deems relevant in its business judgment, including the nature of the matters to be considered, the facts and circumstances surrounding any request for a meeting and any plan of the Board to call an annual meeting or a special meeting.

Proposed Section 3.2(c) sets forth certain limitations on Special Meeting Requests. Specifically, a Special Meeting Request will not be valid if:

- It relates to an item of business that is not a proper subject for stockholder action under applicable law;
- it is delivered during the period commencing 90 days prior to the one-year anniversary of the date of the immediately preceding annual meeting and ending on the date of the next annual meeting;
- a Similar Item was presented at any meeting of stockholders held within 120 days prior to the date on which the

[12] *See* Section 151(g) of the DGCL.

[13] Under Delaware law, special meetings of a corporation's stockholders may be called by the board of directors or by such persons as may be authorized by the certificate of incorporation or the bylaws. *See* Section 211(d) of the DGCL.

[14] For purposes of determining Requisite Holders under proposed Section 3.2, ''Net Long Shares'' shall be limited to the number of shares beneficially owned, directly or indirectly, by any stockholder or beneficial owner that constitute such person's ''net long position'' as defined in Rule 14e–4 under the Act, provided that (A) for the purposes of this definition, references in the rule to ''the date the tender offer is first publicly announced or otherwise made known by the bidder to the holders of the security to be acquired'' shall be the date of the relevant Special Meeting Request and all dates in the one year period prior thereto, the ''highest tender offer price or stated amount of the consideration offered for the subject security'' shall refer to the closing sales price of NASDAQ OMX's capital stock on NASDAQ on such date (or, if such date is not a trading day, the next succeeding trading day), the ''person whose securities are the subject of the offer'' shall refer to NASDAQ OMX, a ''subject security'' shall refer to the issued and outstanding voting stock of NASDAQ OMX; and (B) the net long position of such stockholder shall be reduced by any shares as to which such person does not have the right to vote or direct the vote at the proposed special meeting or as to which such person has entered into a derivative or other agreement, arrangement or understanding that hedges or transfers, in whole or in part, directly or indirectly, any of the economic consequences of ownership of such shares. In addition, to the extent any affiliates of the stockholder or beneficial owner are acting in concert with the stockholder or beneficial owner with respect to the calling of the special meeting, the determination of Net Long Shares may include the effect of aggregating the Net Long Shares (including any negative number) of such affiliate or affiliates. *See* proposed Section 3.2(a) of the By-Laws.

[15] Under proposed Section 3.2(b) of the By-Laws, the election of directors shall be deemed a ''Similar Item'' with respect to all items of business involving the nomination, election or removal of directors.

Special Meeting Request was delivered; or

- a Similar Item is included in NASDAQ OMX's notice of meeting as an item of business to be presented at a stockholder's meeting that has been called but not yet held.

The Board may adjourn or reschedule any previously scheduled special meeting of the stockholders. NASDAQ OMX believes the subject matter limitations set forth in proposed Section 3.2(c) are appropriate in order to comply with applicable law and to prevent multiple considerations of the same item of business. NASDAQ OMX believes the time limits set forth in proposed Section 3.2(c) are appropriate to ensure that NASDAQ OMX is not required to incur the time and expense of calling and holding a special meeting of stockholders immediately prior to an upcoming annual meeting of stockholders or if a Similar Item of business already has been presented at a recent stockholders' meeting.

To be in proper form, a Special Meeting Request must comply with certain requirements, as described further below.[16] NASDAQ OMX's Board will have the sole discretion to determine whether a Special Meeting Request is in proper form.[17] Proposed Section 3.2(d) sets forth the requirements for a Special Meeting Request to be in proper form. These proposed requirements will ensure that NASDAQ OMX has sufficient information to comply with its disclosure requirements under applicable law and that the Requisite Holders maintain a sufficient ownership level through the date of the special meeting. Specifically, a Special Meeting Request shall:

- Be in writing, signed by each Requesting Person [18] and delivered to NASDAQ OMX's Corporate Secretary at NASDAQ OMX's principal executive offices;
- set forth certain information with respect to (i) each person the Requesting Person proposes to nominate for director, (ii) any business the Requesting Person proposes to bring before the meeting and (iii) each Requesting Person; [19] and
- include (i) an agreement by each Requisite Holder to immediately deliver written notice to NASDAQ OMX's Corporate Secretary in the case of any disposition, on or prior to the record date for the special meeting, of any shares of NASDAQ OMX's capital stock held of record by such Requisite Holder and (ii) an acknowledgement that (1) any such disposition shall be deemed a revocation of the Special Meeting Request to the extent of such disposition and (2) if, following such deemed revocation, the Requisite Holders hold of record, in the aggregate, less than the Requisite Percentage of the voting power of all outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors, NASDAQ OMX shall have no obligation to hold the special meeting.

Proposed Section 3.2(f) provides that at any special meeting of the stockholders, the only business to be conducted or considered will have been specified in the notice of meeting (or any supplement thereto) given by or at the direction of NASDAQ OMX's Board or Corporate Secretary, as the case may be. In any event, however, NASDAQ OMX's Board may submit its own proposal or proposals for consideration at a special meeting. Except as otherwise allowed under proposed Section 3.2, stockholders will not be permitted to propose business to be brought before a special meeting of the stockholders. NASDAQ OMX believes these provisions are reasonable and necessary to limit the items of business that may be considered at a special meeting to those that were proposed by the Company, the Board or stockholders that comply with the requirements and procedures set forth in the By-Laws.

Proposed Section 3.2(g) will require the Requisite Holders giving a Special Meeting Request to further update and supplement the request, if necessary, so that the information in the request is true and correct as of the record date for the special meeting and as of the 10th business day prior to the special meeting or any adjournment or postponement thereof. This requirement will ensure that NASDAQ OMX, its Board and its other stockholders are notified of changes to the information they will consider in assessing a proposed item of business prior to the special meeting. In the case of an update and supplement required to be made as of the record date, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the fifth business day after the record date for the special meeting. In the case of an update and supplement required to be made as of the 10th business day prior to the special meeting or any adjournment or postponement thereof, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the eighth business day prior to the date for the special meeting or, if practical, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the special meeting has been adjourned or postponed).

Proposed Section 3.2(h) will allow the Requisite Holders to revoke a Special Meeting Request by written revocation delivered to NASDAQ OMX at any time prior to the special meeting requested. However, NASDAQ OMX's Board will have the discretion to determine whether or not to proceed with the special meeting. The Board might wish to continue with the special meeting if, for example, the Company has already spent the time and expense required to call the meeting or if the agenda for the meeting includes items other than those proposed in the Special Meeting Request.

Finally, NASDAQ OMX proposes to designate as Section 3.2(i) existing text that sets forth the requirements for stockholders to submit nominees for election as directors at certain stockholder meetings. NASDAQ OMX further proposes to make a minor change to this text to clarify that NASDAQ OMX's Board, rather than the Company itself, will call a special meeting on behalf of the Company.

(b) Annual Meetings of Stockholders

Section 3.1 of NASDAQ OMX's By-Laws, which is the ''advance notice'' provision,[20] requires stockholders to notify NASDAQ OMX, during a specified period in advance of an annual meeting, of their intention to nominate one or more persons for election to the Board or to present a business proposal for consideration by the stockholders at the meeting. While designing the proposed procedural requirements for stockholders to call a special meeting, as outlined above, NASDAQ OMX evaluated the existing procedural requirements for

[16] *See* proposed Section 3.2(a) of the By-Laws.

[17] *Id.*

[18] ''Requesting Person'' means (i) each Requisite Holder, (ii) the beneficial owner or beneficial owners, if different, on whose behalf the Special Meeting Request is being delivered to NASDAQ OMX's Corporate Secretary and (iii) any affiliate or associate of such stockholder or beneficial owner. *See* proposed Section 3.2(e) of the By-Laws.

[19] The information required is the same information required from Proposing Persons with respect to nominations or items of business to be brought before an annual meeting of stockholders and is described in detail in Section (iv)(b) below.

[20] ''Advance notice'' provisions allow stockholder(s) to bring business before an annual meeting of stockholders, but set forth procedural requirements to ensure that companies and boards have sufficient information about the proposal and the proposing stockholder(s), as well as adequate time to consider the proposal, by requiring the proposing stockholder(s) to give advance notice of the intention to bring the proposal before the annual meeting.

stockholders to bring business before an annual meeting. NASDAQ OMX is therefore proposing changes to some of these procedures to enhance them and conform them, in some cases, to the procedures relating to special meetings. Generally, the proposed amendments add requirements for extensive disclosures by proposing stockholders about themselves, any proposed nominees for director and any proposed items of business to be brought before a meeting. The specific amendments are discussed in detail below.

First, Section 3.1(a) of the By-Laws currently states that nominations of persons for election to NASDAQ OMX's Board and the proposal of other business to be considered by the stockholders at an annual meeting of stockholders may be made only: (i) Pursuant to the Company's notice of meeting (or any supplement thereto); (ii) by or at the direction of NASDAQ OMX's Board or its Nominating & Governance Committee; or (iii) by any stockholder of the Company that meets certain requirements. These requirements state that the stockholder must: (i) Be a stockholder of record at the time of delivery of notice to the Company of nominees or other business to be conducted at the meeting; (ii) be entitled to vote at the meeting; and (iii) comply with the notice procedures set forth in the By-Laws. NASDAQ OMX proposes to add a parenthetical to the requirement that a stockholder must be a stockholder of record to clarify that a nomination or proposal of other business may be made on behalf of a beneficial owner, if different from the stockholder of record, only if the beneficial owner is the beneficial owner of NASDAQ OMX shares. This modification will clarify that both record and beneficial owners of NASDAQ OMX stock have the right to propose nominees or business to be considered at an annual meeting. NASDAQ OMX further proposes that a stockholder who proposes nominees or business to be considered at an annual meeting must hold shares in the Company at the time of the meeting, in addition to the time of delivery of the required notice to the Company. This will ensure that a stockholder retains an interest in the Company until the meeting at which the stockholder's nominee or other business is considered. Finally, NASDAQ OMX proposes to number the procedural requirements for stockholders who propose nominees or business to make them easier to understand.

Currently, Section 3.1(b) of the By-Laws sets forth the requirements for a stockholder's notice to NASDAQ OMX of nominations or other business to be considered at an annual meeting. NASDAQ OMX proposes certain amendments to this section to ensure that NASDAQ OMX has sufficient information about such nominations or other business proposed by a stockholder to enable the Company, the Board and the other stockholders to assess a position on the nominations or other business. The additional information requirements will also ensure that NASDAQ OMX can make adequate disclosures to its stockholders and comply with requirements under applicable law.

Specifically, NASDAQ OMX proposes an amendment to the first paragraph of this section to require a stockholder who provides a notice relating to a nomination to include with the notice, a completed and signed questionnaire, representation and agreement relating to the nominee(s) for director.[21] NASDAQ OMX also proposes to require a stockholder who provides a notice to further update and supplement the notice, if necessary, so that the information in the notice is true and correct as of the record date for the annual meeting and as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof.[22] This requirement will ensure that NASDAQ OMX, its Board and its other stockholders are notified of changes to the information they will consider in assessing a proposed item of business prior to the annual meeting. In the case of an update and supplement required to be made as of the record date, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the fifth business day after the record date for the annual meeting. In the case of an update and supplement required to be made as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the eighth business day prior to the date for the annual meeting or, if practicable, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the annual meeting has been adjourned or postponed).

Section 3.1(b)(i) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ OMX about each person whom the stockholder proposes to nominate for election as a director. NASDAQ OMX proposes changes to this section to use the defined term ''Proposing Person'' instead of stockholder,[23] to require information with respect to nominees for reelection as well as nominees for election, to correct a reference to the Act and to add numbering and other organizational changes to make the requirements easier to read and understand. NASDAQ OMX also proposes to require the same information with respect to a proposed nominee that will be required with respect to a Proposing Person, as discussed further below. In addition, NASDAQ OMX proposes to add two new informational requirements for proposed nominees, including:

- A description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships, between or among any Proposing Person, on the one hand, and such proposed nominee and any of his or her respective affiliates and associates, on the other hand, including, without limitation, all information that would be required to be disclosed pursuant to Item 404 under Regulation S–K if such Requesting Person were the ''registrant'' for purposes of such rule and the proposed nominee were a director or executive officer of such registrant; and
- a completed and signed questionnaire, representation and agreement.[24]

Finally, NASDAQ OMX proposes to add a catch-all provision to Section 3.1(b)(i) of the By-Laws that will allow the Company to require any proposed nominee to furnish such other information (i) as the Company may reasonably require to determine the eligibility of such proposed nominee to

[21] The contents of and rationale for the questionnaire, representation and agreement are discussed further in Section (iv)(c) below.

[22] NASDAQ OMX notes that this proposal is similar to proposed Section 3.2(g) of the By-Laws, which requires updates and supplements to a stockholder notice relating to a special meeting. This proposed change is discussed further in Section (iv)(a) above.

[23] ''Proposing Person'' means (i) the stockholder providing the notice of business or the notice of the nomination, as applicable, proposed to be brought before an annual meeting, (ii) any beneficial owner or beneficial owners, if different, on whose behalf such business is proposed to be brought before the meeting or the notice of the nomination proposed to be made at the meeting is made, as applicable, and (iii) any affiliate or associate (each within the meaning of Rule 12b–2 under the Act for purposes of the By-Laws) of such stockholder or beneficial owner. *See* proposed Section 3.1(c) of the By-Laws.

[24] The contents of and rationale for the questionnaire, representation and agreement are discussed further in Section (iv)(c) below.

serve as a director or (ii) that could be material to a reasonable stockholder's understanding of the independence, or lack of independence, of such proposed nominee. NASDAQ OMX believes that all of the new information requirements included in proposed Section 3.1(b)(i) are reasonable and necessary in order to assist the Company in evaluating director eligibility, independence and potential conflicts of interest.

Section 3.1(b)(ii) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ OMX about any business, other than nominations for director, that the stockholder proposes to bring before an annual meeting. NASDAQ OMX proposes changes to this section to require that the description of the proposed business be reasonably detailed, to use the defined term ''Proposing Person'' instead of stockholder and beneficial owner in certain places and to add numbering, reordering and other organizational changes to make the requirements easier to read and understand. NASDAQ OMX also proposes to add a new requirement for a stockholder to provide a reasonably detailed description of all contracts, agreements, arrangements and understandings between or among any of the Proposing Persons or between or among any Proposing Person in connection with the proposal. NASDAQ OMX believes this information will be useful in assessing the aims and incentives of Proposing Persons in proposing business before an annual meeting.

Section 3.1(b)(iii) of the By-Laws currently sets forth the information that a stockholder who proposes nominee(s) for director or other business to be put forth before an annual meeting must provide to NASDAQ OMX about such stockholder and the beneficial owner, if any, on whose behalf the nomination or proposal is made. NASDAQ OMX proposes changes to this section to use the defined term ''Proposing Person'' instead of stockholder and beneficial owner in certain places and to add numbering, reordering and other organizational changes to make the requirements easier to read and understand.

Relating to the existing requirement in Section 3.1(b)(iii)(B) that a proposing stockholder describe the class or series and number of shares of NASDAQ OMX capital stock owned beneficially and of record by such stockholder and the beneficial owner, NASDAQ OMX proposes to add a parenthetical stating that beneficial ownership shall be determined within the meaning of Rule 13d-3 under the Act. NASDAQ OMX also proposes to state that a Proposing Person shall in all events be deemed to beneficially own any shares of any class or series of NASDAQ OMX's capital stock as to which such person has a right to acquire beneficial ownership at any time in the future. These proposed changes merely clarify how the concept of beneficial ownership will be interpreted under this section of the By-Laws.

Current Section 3.1(b)(iii)(D) requires proposing stockholders to describe to NASDAQ OMX any agreement, arrangement or understanding (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares) that has been entered into as of the date of the notice by the stockholder and the beneficial owners with respect to NASDAQ OMX's stock. Given the increased complexity of such transactions in today's marketplace, NASDAQ OMX proposes to replace the current language with a similar requirement for disclosure of any Synthetic Equity Interest,[25] without regard to whether: (i) The derivative, swap or other transaction or series of transactions conveys any voting rights in such shares to the Proposing Person; (ii) the derivative, swap or other transaction or series of transactions is required to be, or is capable of being, settled through delivery of such shares; or (iii) the Proposing Person may have entered into other transactions that hedge or mitigate the economic effect of such derivative, swap or other transaction or series of transactions. This proposed provision will assist NASDAQ OMX, its Board and its other stockholders in understanding a Proposing Person's full economic interests in NASDAQ OMX and possible aims and incentives in submitting the proposed business for consideration at an annual meeting.

For this same reason, NASDAQ OMX also proposes to add several new disclosures that a Proposing Person must include in a notice to NASDAQ OMX regarding nominees or other business to be conducted at an annual meeting. These include disclosures regarding:

- Any proxy (other than a revocable proxy or consent given in response to a solicitation made pursuant to, and in accordance with, Section 14(a) of the Act by way of a solicitation statement filed on Schedule 14A), agreement, arrangement, understanding or relationship pursuant to which the Proposing Person has or shares a right to vote any shares of any class or series of NASDAQ OMX;[26]
- any proportionate interest in NASDAQ OMX shares or Synthetic Equity Interest held, directly or indirectly, by a general or limited partnership in which the Proposing Person is a general partner or, directly or indirectly, beneficially owns an interest in a general partner;[27]
- any agreement, arrangement, understanding or relationship, including any repurchase or similar so-called ''stock borrowing'' agreement or arrangement, entered into or engaged in, directly or indirectly, by the Proposing Person, the purpose or effect of which is to mitigate loss to, reduce the economic risk (of ownership or otherwise) of shares of any class or series of NASDAQ OMX by, manage the risk of share price changes for, or increase or decrease the voting power of, the Proposing Person with respect to shares of any class or series of NASDAQ OMX, or that provides, directly or indirectly, the opportunity to profit from any decrease in the price or value of shares of any class or series of NASDAQ OMX (any of the foregoing, a ''Short Interest'');[28]
- any performance-related fees (other than an asset-based fee) to which the Proposing Person is entitled based on any increase or decrease in the price or value of shares of any class or series of NASDAQ OMX, or any Synthetic Equity Interest or Short Interest;[29]
- any significant equity interest or any Synthetic Equity Interest or Short Interest in any principal competitor of

[25] ''Synthetic Equity Interest'' shall mean any derivative, swap or other transaction (including any short positions, profit interest, options, warrants, convertible securities, stock appreciation or similar rights) or series of transactions engaged in, directly or indirectly, by a Proposing Person, the purpose or effect of which is to give the Proposing Person economic risk similar to ownership of shares of any class or series of NASDAQ OMX, including due to the fact that the value of such derivative, swap or other transaction or series of transactions is determined by reference to the price, value or volatility of any shares of any class or series of NASDAQ OMX, or which derivative, swap or other transaction or series of transactions provides, directly or indirectly, the opportunity to profit from any increase in the price or value of shares of any class or series of NASDAQ OMX. *See* proposed Section 3.1(b)(iii)(D) of the By-Laws.

[26] *See* proposed Section 3.1(b)(iii)(E) of the By-Laws.

[27] *See* proposed Section 3.1(b)(iii)(F) of the By-Laws.

[28] *See* proposed Section 3.1(b)(iii)(G) of the By-Laws.

[29] *See* proposed Section 3.1(b)(iii)(H) of the By-Laws.

NASDAQ OMX held by the Proposing Person; [30]

• any direct or indirect interest of the Proposing Person in any contract with NASDAQ OMX, any affiliate of NASDAQ OMX or any principal competitor of NASDAQ OMX (including, in any such case, any employment agreement, collective bargaining agreement or consulting agreement); [31]

• any pending or threatened litigation in which the Proposing Person is a party or material participant involving NASDAQ OMX or any of its officers or directors, or any affiliate of NASDAQ OMX; [32]

• any material transaction occurring, in whole or in part, during the then immediately preceding 12-month period between such Proposing Person, on the one hand, and NASDAQ OMX, any affiliate of NASDAQ OMX or any principal competitor of NASDAQ OMX, on the other hand; [33] and

• any other information relating to the Proposing Person required to be disclosed in a proxy statement or other filings required to be made in connection with solicitations of proxies for, as applicable, the proposal and/or for the election of directors in an election contest pursuant to and in accordance with Section 14(a) of the Act and the rules and regulations promulgated thereunder.[34]

(c) Questionnaire, Representation and Agreement for Director-Nominees

NASDAQ OMX proposes to add a new Section 3.5 to its By-Laws to require nominees for director to deliver to NASDAQ OMX, in accordance with the time periods prescribed for delivery of a stockholder's notice: (i) A written questionnaire with respect to the background and qualifications of the nominee; and (ii) a written representation and agreement as to certain matters. Specifically, the written representation and agreement will provide that the nominee:

• Is not and will not become a party to (i) any agreement as to how the nominee will act or vote on any issue or question (a ''Voting Commitment'') that has not been fully disclosed to NASDAQ OMX or (ii) any Voting Commitment that could limit or interfere with the nominee's fiduciary duties under applicable law;

• is not and will not become a party to any agreement with any person other than NASDAQ OMX with respect to any direct or indirect compensation, reimbursement or indemnification in connection with service or action as a director of NASDAQ OMX that has not been fully disclosed to NASDAQ OMX;

• would be in compliance, if elected, and will comply, with the provisions of NASDAQ OMX's By-Laws relating to qualifications of directors, conflicts of interest and contracts and transactions involving directors; and

• in such proposed nominee's individual capacity and on behalf of any person on whose behalf the nomination is made, would be in compliance, if elected, and will comply, with NASDAQ OMX's Corporate Governance Guidelines, Board of Director Code of Conduct and Code of Ethics, including all applicable, publicly disclosed conflict of interest, confidentiality, stock ownership and insider trading policies and guidelines.

The requirements of proposed Section 3.5 of the By-Laws, which will apply to both the Company's and stockholders' nominees for director, will ensure that NASDAQ OMX has the necessary information about nominees to fulfill its public disclosure requirements. The requirements also will ensure that nominees will comply with the legal obligations, policies and procedures applicable to all NASDAQ OMX directors.

(d) *Removal and Replacement of Supermajority Voting Provisions*

Consistent with the proposed amendments to remove and replace the supermajority voting provisions in the Charter discussed above, NASDAQ OMX proposes to amend each provision of the By-Laws that currently requires a supermajority vote of stockholders to instead require a ''majority of votes outstanding.'' NASDAQ OMX's By-Laws currently include the following two supermajority voting requirements, each of which conforms with an analogous provision in the Charter.

• *Removal of Directors.* Section 4.6 provides that any or all of the directors may be removed from office at any time by the affirmative vote of at least 66⅔% of the total voting power of the Voting Stock, voting together as a single class.[35]

• *Adoption, Alteration, Amendment and Repeal of By-Laws.* Section 11.1 provides that the By-Laws may be altered amended or repealed, or new By-Laws may be adopted, at any meeting of the stockholders by the affirmative vote of the holders of at least 66⅔% of the voting power of the Voting Stock, voting together as a single class.[36]

To conform with the proposed changes to the Charter, NASDAQ OMX proposes to replace each of these supermajority voting requirements with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock. As discussed above with respect to the analogous Charter amendments, NASDAQ OMX believes that a ''majority of outstanding shares'' standard reflects a balanced approach that responds to stockholder feedback while appropriately maintaining NASDAQ OMX's defensive posture against hostile takeovers.

(e) Procedures for Filling Board Vacancies

Section 4.8 of the By-Laws sets forth the procedures to fill a director position that has become vacant, whether because of death, disability, disqualification, removal or resignation. Under the current provisions, if such a vacancy occurs, the Nominating & Governance Committee of the Board shall nominate, and the Board shall elect by majority vote, a person to fill the vacancy. In light of the addition of a right for stockholders to call a special meeting, as discussed above, NASDAQ OMX proposes amendments to Section 4.8 to state explicitly that vacancies on the Board are to be filled by a majority vote of the Board, and not by stockholders. In addition, to prescribe procedures in case multiple Board vacancies occur at the same time, the proposed amendments state that a Board vacancy shall be filled by the majority of the directors, even if there is less than a quorum, or by the sole remaining director, if there is only one director remaining on the Board. The proposed amendments do not change any of the other procedures for filling Board vacancies.

(f) Use of Electronic Means for Certain Notices and Related Waivers

Currently, Section 4.12(a) of the By-Laws provides that notice of any

[30] *See* proposed Section 3.1(b)(iii)(I) of the By-Laws.

[31] *See* proposed Section 3.1(b)(iii)(J) of the By-Laws.

[32] *See* proposed Section 3.1(b)(iii)(K) of the By-Laws.

[33] *See* proposed Section 3.1(b)(iii)(L) of the By-Laws.

[34] *See* proposed Section 3.1(b)(iii)(M) of the By-Laws. NASDAQ OMX also proposes to include an exception to each of the aforementioned disclosure requirements for any disclosures with respect to the ordinary course business activities of any broker, dealer, commercial bank, trust company or other nominee who is a Proposing Person solely as a result of being the stockholder directed to prepare and submit the notice required by the By-Laws on behalf of a beneficial owner.

[35] This provision is analogous to Article Fifth, Paragraph D of the Charter, which is discussed under Section (ii)(a) above.

[36] This provision is analogous to Article Eighth, Paragraph A of the Charter, which is discussed under Section (ii)(a) above.

meeting of the Board shall be deemed duly given to a director if, among other methods, the notice is sent to the director at the address last made known in writing to NASDAQ OMX by telegraph, telefax, cable, radio or wireless. Section 4.12(b) of the By-Laws provides that such notice of a board meeting need not be given to any director if waived by the director in writing or by electronic transmission (or by telegram, telefax, cable, radio or wireless and subsequently confirmed in writing or by electronic transmission). NASDAQ OMX proposes amendments to Sections 4.12(a) and (b) to provide that both notices and waivers of such notices can be given by email or other means of written electronic transmission. These amendments are intended merely to expand the means through which notices and waivers of notices may be given, and the amendments do not affect any of the other procedural requirements of Sections 4.12(a) and (b). In addition, the proposed amendments reflect current practices, as a substantial amount of communications between NASDAQ OMX and its directors, outside of Board meetings, occurs through electronic means.

(g) Composition of the Management Compensation Committee

As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act and Rule 10C–1 under the Exchange Act,[37] NASDAQ recently amended its listing rules relating to compensation committees.[38] Since NASDAQ OMX is listed on NASDAQ, it must comply with these listing rules just like any other listed company. NASDAQ OMX therefore proposes amendments to Section 4.13(f) of the By-Laws, which relates to the composition of the Management Compensation Committee of NASDAQ OMX's Board, to conform to the recent amendments to NASDAQ's listing rules. Specifically, NASDAQ OMX proposes to state that the Management Compensation Committee must consist of at least two members and that each member shall meet the eligibility requirements set forth in the rules of The NASDAQ Stock Market.

(h) No Amendment or Repeal of Certain By-Law Amendments

While current Section 11.1 of the By-Laws provides for alteration, amendment, repeal and adoption of By-Laws by the stockholders, current Section 11.2 provides for alteration, amendment, repeal and adoption of By-Laws by the Board. These two sections operate as alternate means to alter, amend, repeal or adopt By-Laws. In other words, the stockholders may alter, amend, repeal or adopt By-Laws without any action by the Board, and vice versa. NASDAQ OMX proposes to add a proviso to Section 11.2 to state that no By-Law adopted by the stockholders shall be amended or repealed by the Board if the By-Law so adopted so provides. This is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholder action to amend or repeal the By-Laws.

(i) *Non-Substantive Changes*

The remaining proposed By-Law amendments are non-substantive changes, which will simplify and streamline the document. Specifically, NASDAQ OMX proposes minor changes to Section 3.3 to incorporate the new defined term ''Proposing Person,'' to use the term ''nomination'' rather than ''nominee'' for consistency and to correct two cross-references. NASDAQ OMX also proposes to delete obsolete references to the 3.75% Series A Convertible Notes due 2012 and the Series B Convertible Notes due 2012, which are no longer outstanding, in Section 12.7.

In addition, NASDAQ OMX proposes to correct typographical errors and/or delete obsolete cross-references in Article I(f), Section 4.3, Section 9.4(b), Section 12.5 and Section 12.6. Finally, NASDAQ OMX proposes to renumber and reorganize the provisions of the By-Laws, where necessary following the other amendments.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[39] in general, and furthers the objectives of Section 6(b)(5) of the Act,[40] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

In response to feedback from its investors, NASDAQ OMX is proposing changes to its Charter to replace each supermajority voting requirement with a ''majority of outstanding shares'' voting standard. NASDAQ OMX believes this approach will strike an appropriate balance between responding to stockholder feedback and protecting the Company and its investors against hostile takeovers. In addition, the clarifying changes to the Charter will protect investors by making the Charter more concise and easier to understand. Both sets of changes to the Charter were approved by NASDAQ OMX's investors at the most recent annual meeting of stockholders.

NASDAQ OMX also proposes to eliminate the Certificate of Designation relating to the Series A Convertible Preferred Stock, which is no longer outstanding. This proposed change will protect investors by enhancing the clarity of NASDAQ OMX's Charter.

Finally, NASDAQ OMX proposes changes to its By-Laws: (i) To implement a stockholder right to call a special meeting; (ii) to enhance the ''advance notice'' procedures; (iii) to require certain information and agreements from director-nominees; (iv) to remove and replace the supermajority voting provisions to conform to the Charter amendments; (v) to clarify the procedures for filling Board vacancies; (vi) to allow the use of electronic means for certain notices and waivers; (vii) to conform the composition requirements for the Management Compensation Committee of NASDAQ OMX's Board with the NASDAQ listing rules; (vii) [sic] to prevent the Board from amending or repealing By-Law amendments approved by the stockholders; and (viii) [sic] to make other non-substantive changes.

The proposals relating to the stockholder right to call a special meeting and to remove and replace the supermajority voting requirements are responsive to feedback from NASDAQ OMX's stockholders. The additional procedural requirements relating to special and annual meetings will protect investors by stating clearly and explicitly the procedures stockholders must follow to propose business at such meetings. The requirement for certain information and agreements from director-nominees will enhance investor protection by ensuring that nominees provide adequate information about themselves and also comply with applicable law and certain NASDAQ OMX policies and procedures relating to the Board. The prohibition on the Board amending or repealing By-Law amendments approved by the stockholders is a stockholder-friendly provision that is intended to prevent the

[37] *See* Public Law 111–203, 124 Stat. 1376 (2010) and 17 CFR 240.10C–1.

[38] *See* Securities Exchange Act Release No. 68640 (January 11, 2013), 78 FR 4554 (January 22, 2013) (SR–NASDAQ–2012–109). Among other things, the amendments require each NASDAQ-listed company, with certain exceptions, to have a compensation committee of its board of directors, consisting of a minimum of two independent directors who meet additional eligibility requirements relating to compensatory fees and affiliation.

[39] 15 U.S.C. 78f(b).

[40] 15 U.S.C. 78f(b)(5).

Board from subsequently overriding stockholders' wishes. Finally, the remaining changes are clarifying in nature, and they enhance investor protection by conforming NASDAQ OMX's governance documents to current practices and applicable rules and by making them clearer and easier to understand.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of NASDAQ OMX and not to the operations of the Exchange, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2013–148 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2013–148. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2013–148, and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–29611 Filed 12–11–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71014; File No. SR–MIAX–2013–53]

Self-Regulatory Organizations: Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change for the Extension of a Pilot Program for SPY Position and Exercise Limits

December 6, 2013.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 26, 2013, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rules 307 and 309 to extend the pilot program that eliminates the position and exercise limits for physically-settled options on the SPDR S&P 500 ETF Trust (''SPY Pilot Program'').

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rule 307, Commentary .01, Position Limits, and Exchange Rule 309, Commentary .01, Exercise limits, to extend the duration of the SPY Pilot Program through December 15, 2014. There are no substantive changes being proposed to the SPY Pilot Program.

In proposing to extend the SPY Pilot Program, the Exchange affirms its consideration of several factors that support the proposal to establish the SPY Pilot Program, which include: (1) The liquidity of the option and the underlying security; (2) the market

[41] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

capitalization of the underlying security and the securities that make up the S&P 500 Index; (3) options reporting requirements; and (4) financial requirements imposed by MIAX and the Commission.

The Pilot Report for the SPY Pilot Program is not due until on or before January 5, 2014. However, because not all self-regulatory organizations (''SROs'') have adopted similar rules eliminating position and exercise limits for SPY options and because market participants that are members of such SROs are required to comply with the more restrictive SPY option position and exercise limits, no market participants have availed themselves of the SPY Pilot Program. As a result, there is not sufficient data to compile a meaningful Pilot Report at this time to file with this current extension request.

The Exchange believes that it is appropriate to extend the SPY Pilot Program for an additional thirteen months to provide time for other SROs to adopt similar pilot programs that eliminate positions and exercise limits for SPY options. In that event (and in a year's time), the Exchange will be able to either extend the SPY Pilot Program, adopt the SPY Pilot Program on a permanent basis, or terminate the SPY Pilot Program.

The Exchange represents that the Pilot Report would be submitted within thirty (30) days of the end of the first twelve months of the extended SPY Pilot Program time period and would cover the twelve months that just ended. The Pilot Report will compare the impact of the pilot program, if any, on the volumes of SPY options and the volatility in the price of the underlying SPY contract, particularly at expiration. The Pilot Report also will detail the size and different types of strategies employed with respect to positions established in SPY options; note whether any problems, in the underlying SPY ETF or otherwise, arose as a result of the no-limit approach; and include any other information that may be useful in evaluating the effectiveness of the pilot program. In preparing the Pilot Report, the Exchange will utilize various data elements such as volume and open interest. In addition the Exchange would make available to Commission staff data elements relating to the effectiveness of the SPY Pilot Program.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) [3] of the Act in general, and furthers the objectives of Section 6(b)(5) [4] of the Act in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

Specifically, the Exchange believes that extending the SPY Pilot Program promotes just and equitable principles of trade by permitting market participants, including market makers, institutional investors and retail investors, to establish greater positions when pursuing their investment goals and needs.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any aspect of competition, whether between the Exchange and its competitors, or among market participants. Instead, the proposed rule change is designed to allow the SPY Pilot Program to continue while other SROs adopt similar provisions.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act [5] and Rule 19b–4(f)(6) [6] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov*. Please include File Number SR–MIAX–2013–53 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2013–53. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2013–53 and should be submitted on or before January 2, 2014. For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Elizabeth Murphy,

Secretary.

[FR Doc. 2013–29618 Filed 12–11–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71009; File No. SR–MIAX–2013–56]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Fee Schedule

December 6, 2013.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 29, 2013, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend its Fee Schedule.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing*, at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify its current Priority Customer Rebate Program (the ''Program'') to (i) lower the volume thresholds of the four highest volume tiers; and (ii) increase the per contract credit for the three highest volume tiers. The new terms of the Program will be implemented for a period beginning December 1, 2013 and ending December 31, 2013.[3] The Program currently applies to the period beginning July 1, 2013 and ending November 30, 2013.[4] The Program is based on the substantially similar fees of another competing options exchange.[5] Under the Program, the Exchange shall credit each Member the per contract amount set forth in the table below resulting from each Priority Customer[6] order transmitted by that Member which is executed on the Exchange in all multiply-listed option classes (excluding mini-options and executions related to contracts that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in Rule 1400), provided the Member meets certain volume thresholds in a month as described below. The volume thresholds are calculated based on the customer average daily volume over the course of the month. Volume will be recorded for and credits will be delivered to the Member Firm that submits the order to the Exchange.

Percentage Thresholds of National Customer Volume in Multiply-Listed Options Classes Listed on MIAX (Monthly)	Per Contract Credit
0.00%–0.25%	$0.00
Above 0.25%–0.35%	$0.10
Above 0.35%–0.75%	$0.15
Above 0.75%–1.50%	$0.17
Above 1.50%	$0.18

The Exchange will aggregate the contracts resulting from Priority Customer orders transmitted and executed electronically on the Exchange from affiliated Members for purposes of the thresholds above, provided there is at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A. In the event of a MIAX System outage or other interruption of electronic trading on MIAX, the Exchange will adjust the national customer volume in multiply-listed options for the duration of the outage. A Member may request to receive its credit under the Priority Customer Rebate Program as a separate direct payment.

In addition, the rebate payments will be calculated from the first executed contract at the applicable threshold per contract credit with the rebate payments made at the highest achieved volume tier for each contract traded in that month. For example, if Member Firm XYZ, Inc. (''XYZ'') has enough Priority Customer contracts to achieve 2.5% of the national customer volume in multiply-listed option contracts during the month of October, XYZ will receive a credit of $0.18 for each Priority Customer contract executed in the month of October [sic].

The purpose of the Program is to encourage Members to direct greater Priority Customer trade volume to the Exchange. Increased Priority Customer volume will provide for greater liquidity, which benefits all market participants. The practice of incentivizing increased retail customer order flow in order to attract professional liquidity providers (Market-Makers) is, and has been, commonly practiced in the options markets. As such, marketing fee programs,[7] and customer posting incentive programs,[8] are based on attracting public customer order flow. The Program similarly intends to attract Priority Customer order flow, which

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that at the end of the period, the Program will expire unless the Exchange files another 19b-4 Rule Filing to amend its fees.

[4] *See* Securities Exchange Act Release Nos. 70769 (October 29, 2013), 78 FR 66094 (November 4, 2013); 70523 (September 26, 2013), 78 FR 60966 (October 2, 2013) (SR–MIAX–2013–47); 69947 (July 9, 2013), 78 FR 42138 (July 15, 2013) (SR–MIAX–2013–31).

[5] *See* Chicago Board Options Exchange, Incorporated (''CBOE'') Fees Schedule, p. 4. *See also* Securities Exchange Act Release Nos. 66054 (December 23, 2011), 76 FR 82332 (December 30, 2011) (SR–CBOE–2011–120); 68887 (February 8, 2013), 78 FR 10647 (February 14, 2013) (SR–CBOE–2013–017).

[6] The term ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial accounts(s). *See* MIAX Rule 100.

[7] *See* MIAX Fee Schedule, Section 1(b).

[8] *See* NYSE Arca, Inc. Fees Schedule, page 4 (section titled ''Customer Monthly Posting Credit Tiers and Qualifications for Executions in Penny Pilot Issues'').

will increase liquidity, thereby providing greater trading opportunities and tighter spreads for other market participants and causing a corresponding increase in order flow from such other market participants.

The specific volume thresholds of the Program's tiers were set based upon business determinations and an analysis of current volume levels. The volume thresholds are intended to incentivize firms that route some Priority Customer orders to the Exchange to increase the number of orders that are sent to the Exchange to achieve the next threshold and to incent new participants to send Priority Customer orders as well. Increasing the number of orders sent to the Exchange will in turn provide tighter and more liquid markets, and therefore attract more business overall. Similarly, the different credit rates at the different tier levels were based on an analysis of revenue and volume levels and are intended to provide increasing ''rewards'' for increasing the volume of trades sent to the Exchange. The specific amounts of the tiers and rates were set in order to encourage suppliers of Priority Customer order flow to reach for higher tiers.

The Exchange proposes limiting the Program to multiply-listed options classes on MIAX because MIAX does not compete with other exchanges for order flow in the proprietary, singly-listed products.[9] In addition, the Exchange does not trade any singly-listed products at this time, but may develop such products in the future. If at such time the Exchange develops proprietary products, the Exchange anticipates having to devote a lot of resources to develop them, and therefore would need to retain funds collected in order to recoup those expenditures.

The Exchange proposes excluding mini-options and executions related to contracts that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in Exchange Rule 1400 from the Program. The Exchange notes these exclusions are nearly identical to the ones made by CBOE.[10] Mini-options contracts are excluded from the Program because the cost to the Exchange to process quotes, orders and trades in mini-options is the same as for standard options. This, coupled with the lower per-contract transaction fees charged to other market participants, makes it impractical to offer Members a credit for Priority Customer mini-option volume that they transact. Providing rebates to Priority Customer executions that occur on other trading venues would be inconsistent with the proposal. Therefore, routed away volume is excluded from the Program in order to promote the underlying goal of the proposal, which is to increase liquidity and execution volume on the Exchange.

The credits paid out as part of the program will be drawn from the general revenues of the Exchange.[11] The Exchange calculates volume thresholds on a monthly basis.

The proposed changes will become operative on December 1, 2013.

2. Statutory Basis

The Exchange believes that its proposal to amend its fee schedule is consistent with Section 6(b) of the Act[12] in general, and furthers the objectives of Section 6(b)(4) of the Act[13] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange believes that the proposed Priority Customer Rebate Program is fair, equitable and not unreasonably discriminatory. The Program is reasonably designed because it will incent providers of Priority Customer order flow to send that Priority Customer order flow to the Exchange in order to receive a credit in a manner that enables the Exchange to improve its overall competitiveness and strengthen its market quality for all market participants. The proposed rebate program is fair and equitable and not unreasonably discriminatory because it will apply equally to all Priority Customer orders. All similarly situated Priority Customer orders are subject to the same rebate schedule, and access to the Exchange is offered on terms that are not unfairly discriminatory. In addition, the Program is equitable and not unfairly discriminatory because, while only Priority Customer order flow qualifies for the Program, an increase in Priority Customer order flow will bring greater volume and liquidity, which benefit all market participants by providing more trading opportunities and tighter spreads. Similarly, offering increasing credits for executing higher percentages of total national customer volume (increased credit rates at increased volume tiers) is equitable and not unfairly discriminatory because such increased rates and tiers encourage Members to direct increased amounts of Priority Customer contracts to the Exchange. The resulting increased volume and liquidity will benefit those Members who receive the lower tier levels, or do not qualify for the Program at all, by providing more trading opportunities and tighter spreads.

Limiting the Program to multiply-listed options classes listed on MIAX is reasonable because those parties trading heavily in multiply-listed classes will now begin to receive a credit for such trading, and is equitable and not unfairly discriminatory because the Exchange does not trade any singly-listed products at this time. If at such time the Exchange develops proprietary products, the Exchange anticipates having to devote a lot of resources to develop them, and therefore would need to retain funds collected in order to recoup those expenditures.

B. Self-Regulatory Organization's Statement on Burden on Competition

MIAX does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed change would increase both intermarket and intramarket competition by incenting Members to direct their Priority Customer orders to the Exchange, which will enhance the quality of quoting and increase the volume of contracts traded here. To the extent that there is additional competitive burden on non-Priority Customers, the Exchange believes that this is appropriate because the rebate program should incent Members to direct additional order flow to the Exchange and thus provide additional liquidity that enhances the quality of its markets and increases the volume of contracts traded here. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they

[9] If a multiply-listed options class is not listed on MIAX, then the trading volume in that options class will be omitted from the calculation of national customer volume in multiply-listed options classes.

[10] *See* CBOE Fee Schedule, page 4. CBOE also excludes QCC trades from their rebate program. CBOE excluded QCC trades because a bulk of those trades on CBOE are facilitation orders which are charged at the $0.00 fee rate on their exchange.

[11] Despite providing credits under the Program, the Exchange represents that it will continue to have adequate resources to fund its regulatory program and fulfill its responsibilities as a self-regulatory organization while the Program will be in effect.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4).

deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. The Exchange believes that the proposed rule change reflects this competitive environment because it reduces the Exchange's fees in a manner that encourages market participants to direct their customer order flow, to provide liquidity, and to attract additional transaction volume to the Exchange. Given the robust competition for volume among options markets, many of which offer the same products, implementing a volume based customer rebate program to attract order flow like the one being proposed in this filing is consistent with the above-mentioned goals of the Act. This is especially true for the smaller options markets, such as MIAX, which is competing for volume with much larger exchanges that dominate the options trading industry. As a new exchange, MIAX has a nominal percentage of the average daily trading volume in options, so it is unlikely that the customer rebate program could cause any competitive harm to the options market or to market participants. Rather, the customer rebate program is a modest attempt by a small options market to attract order volume away from larger competitors by adopting an innovative pricing strategy. The Exchange notes that if the rebate program resulted in a modest percentage increase in the average daily trading volume in options executing on MIAX, while such percentage would represent a large volume increase for MIAX, it would represent a minimal reduction in volume of its larger competitors in the industry. The Exchange believes that the proposal will help further competition, because market participants will have yet another additional option in determining where to execute orders and post liquidity if they factor the benefits of a customer rebate program into the determination.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[14] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2013–56 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2013–56. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).*

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2013–56 and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–29608 Filed 12–11–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71017; File No. SR–NASDAQ–2013–134]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify the Listing of Additional Shares Fees Payable by Non-U.S. Companies

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on November 29, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ is proposing to modify the listing of additional shares fees payable by non-U.S. companies.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at

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[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. *Purpose*

NASDAQ's listing of additional shares fees are designed, in part, to offset the costs of NASDAQ's regulatory program associated with oversight of listed companies, including the review of share issuances for compliance with the shareholder approval and voting rights rules, the regulatory review of entities and individuals that purchase a significant interest in a listed company in a transaction with the company, and NASDAQ's efforts to increase the transparency of interpretations of its rules. Currently, the applicable fees depend on whether the company is a domestic or non-U.S. company. Domestic companies pay a fee of $0.01 per share, subject to a minimum quarterly fee of $5,000, for any amount of shares in excess of 49,999 shares issued during a quarter, and a maximum fee of $65,000 per year.[3] In contrast, non-U.S. companies pay a flat fee of $5,000 for any amount of shares in excess of 49,999 shares issued during a year.[4] There is no fee for issuances of up to 49,999 shares per quarter for domestic companies and up to 49,999 shares per year for non-U.S. companies.

NASDAQ proposes to make two changes to the listing of additional shares fees payable by non-U.S. companies. First, NASDAQ proposes to modify the rule such that a foreign company that is not a Foreign Private Issuer [5] pays the same listing of additional shares fees as a domestic company. For purposes of NASDAQ's other rules, a foreign company that is not a Foreign Private Issuer is treated the same as a domestic company.[6] Further, unlike a Foreign Private Issuer, a foreign company that is not a Foreign Private Issuer files the same quarterly reports as a domestic company [7] and is typically not primarily traded on another marketplace. As such, NASDAQ believes it is appropriate to treat these companies the same as domestic companies for purposes of the listing of additional shares fee because they are subject to the same rules and generally trade primarily on NASDAQ.

Second, NASDAQ proposes to increase the listing of additional shares fee applicable to Foreign Private Issuers from $5,000 to $7,500 per year effective January 1, 2014. As under the current rule, no fee would be charged for issuances of up to 49,999 shares per year. NASDAQ believes this change would reduce the current disparity in the listing of additional shares fees paid by Foreign Private Issuers, which also benefit from NASDAQ's regulatory program, and other companies, while still recognizing that those Foreign Private Issuers generally also trade on another marketplace and are subject to an exemption from many of NASDAQ's corporate governance rules. While the proposed $7,500 per year fee would exceed the $5,000 minimum fee applicable to companies that are not Foreign Private Issuers, NASDAQ believes that this higher fee is appropriate given that fee [sic] for Foreign Private Issuers is assessed annually, instead of quarterly, and that Foreign Private Issuers are not subject to per share fees, which can range as high as $65,000 per year.[8]

NASDAQ will implement these changes on January 1, 2014.[9] A foreign company that is not a Foreign Private Issuer will first owe the $0.01 per share listing of additional shares fee for the change in shares outstanding during its first fiscal quarter beginning on or after January 1, 2014.[10] A Foreign Private Issuer will be subject to the new $7,500 fee for the change in its shares outstanding starting with its first fiscal year beginning on or after January 1, 2014.[11] Following effectiveness, if a company ceases to be a Foreign Private Issuer, it will be assessed the listing of additional shares fee based on its new status effective with the start of its next fiscal year, when it is also required to start filing Forms 10–Q and 10–K.[12] If a company becomes a Foreign Private Issuer, it similarly will become subject to the fee applicable to Foreign Private Issuers at the beginning of its next fiscal year.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[13] in general and with Sections 6(b)(4) and (5) of the Act,[14] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and does not unfairly discriminate between customers, issuers, brokers or dealers.

NASDAQ believes that the proposed fees are reasonable and not unfairly discriminatory because they will better allocate costs of NASDAQ's regulatory program across the listed companies that benefit from that program. NASDAQ believes that the proposed $2,500 increase in the listing of additional shares fee applicable to Foreign Private Issuers is reasonable and an equitable allocation of a portion of the costs of NASDAQ's regulatory program, which benefits these companies. While the proposed $7,500 per year fee would exceed the $5,000 minimum quarterly fee applicable to companies that are not Foreign Private Issuers, NASDAQ believes that this higher fee is appropriate given that Foreign Private Issuers are not subject to per share fees, which can range as high as $65,000 per year. In addition, continuing a separate, lower fee for Foreign Private Issuers remains a reasonable and equitable allocation of fees because Foreign Private Issuers generally trade on another marketplace and have exemptions available to many of NASDAQ's governance rules,

[3] Rules 5910(b)(1) and 5920(b)(1).

[4] Rules 5910(b)(2) and 5920(b)(2).

[5] "Foreign Private Issuer" is defined in Rule 3b–4 under the Act, 17 CFR 240.3b–4. See Rule 5005(a)(18). A foreign company that is not a Foreign Private Issuer would be considered a "foreign issuer" under Rule 3b–4. A foreign issuer is also defined to include a foreign government that issues securities.

[6] For example, while a Foreign Private Issuer can rely on an exemption from most of NASDAQ's corporate governance requirements under Rule 5615(a)(3), a foreign company that is not a Foreign Private Issuer is not eligible for that exemption.

[7] Under SEC Rule 13a–13(b)(2), 17 CFR 240.13a–13(b)(2), a Foreign Private Issuer is not required to file quarterly reports with the Commission.

[8] NASDAQ also proposes to make non-substantive changes to replace the term "issuer" with the defined term "Company" throughout the rules and to improve readability of the rule text.

[9] Until January 1, 2014, the online NASDAQ rule book will reflect the currently effective fees with a note indicating that this fee change is pending and will become effective on January 1, 2014. The online NASDAQ rule book will also contain a link to the text of the revised rule.

[10] For example, a company with a December 31st year end would first owe the fee under Rule 5910(b)(1) or Rule 5920(b)(1) for the change in its shares outstanding during its first quarter, as reflect [sic] in the difference between the shares outstanding reported on its Form 10–K for the year ended December 31, 2013, and its Form 10–Q for the quarter ended March 31, 2014.

[11] A Foreign Private Issuer with a December 31st fiscal year will first pay the new fee for shares issued between January 1, 2014 and December 31, 2014 and will be billed for those share issuances based on the Form 20–F filed in 2015.

[12] A foreign company is required to determine whether it is a Foreign Private Issuer on an annual basis as of the end of its second fiscal quarter. If the company determines that it is no longer a Foreign Private Issuer, it must transition to domestic reporting status beginning on the first day of the next fiscal year. SEC Rule 3b–4(e), 17 CFR 240.3b–4(e).

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(4) and (5).

including the shareholder approval and voting rights rules.

NASDAQ also believes that it is reasonable and not unfairly discriminatory to charge a foreign company that is not a Foreign Private Issuer the same fee as a domestic company. The listing situation of a foreign company that is not a Foreign Private Issuer is more similar to a domestic company than it is to a Foreign Private Issuer in that a Foreign Private Issuer often will trade on another marketplace and is subject to exemptions from many of NASDAQ's corporate governance rules. On the other hand foreign companies that are not Foreign Private Issuers, like domestic companies, do not typically trade on other marketplaces and are not eligible to exemptions from the governance requirements. Similarly, a Foreign Private Issuer receives different treatment under the Commission's rules than a foreign company that is not a Foreign Private Issuer.[15]

Finally, NASDAQ believes that the proposed fees are consistent with the investor protection objectives of Section 6(b)(5) of the Act [16] in that they are designed to promote just and equitable principles of trade, to remove impediments to a free and open market and national market system, and in general to protect investors and the public interest. Specifically, the fees are designed to ensure that there are adequate resources for NASDAQ's listing compliance program, which helps to assure that listing standards are properly enforced and investors are protected.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The market for listing services is extremely competitive and listed companies may freely choose alternative venues based on the aggregate fees assessed, and the value provided by each listing. This rule proposal does not burden competition with other listing venues, which are similarly free to set their fees. For these reasons, NASDAQ does not believe that the proposed rule change will result in any burden on competition for listings.

[15] For example, a Foreign Private Issuer is not required to file quarterly reports and is exempt from the proxy rules. *See* SEC Rules 13a–13(b)(2), 17 CFR 240.13a–13(b)(2), and 3a12–3(b), 17 CFR 240.3a12–3(b).

[16] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [17] and paragraph (f) of Rule 19b–4 thereunder.[18] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml*; or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2013–134 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2013–134. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2013–134 and should be submitted on or before January 2, 2014

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–29619 Filed 12–11–13; 8:45 am]

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[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71019; File No. SR–BSECC–2013–001]

Self-Regulatory Organizations; Boston Stock Exchange Clearing Corporation; Notice of Filing of Proposed Rule Change To Amend the Restated Certificate of Incorporation and By-Laws of The NASDAQ OMX Group, Inc.

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1], and Rule 19b-4 thereunder,[2] notice is hereby given that on November 27, 2013, the Boston Stock Exchange Clearing Corporation (''BSECC'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III, below, which Items have been prepared by BSECC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

BSECC is filing this proposed rule change with respect to amendments of the Restated Certificate of Incorporation (the ''Charter'') and By-Laws (the ''By-Laws'') of its parent corporation, The NASDAQ OMX Group, Inc. (''NASDAQ

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

OMX'' or the ''Company''). The proposed amendments will be implemented on a date designated by NASDAQ OMX following approval by the Commission. The text of the proposed rule change is available on BSECC's Web site at *http://nasdaqomxbx.cchwallstreet.com,* at the principal office of BSECC, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, BSECC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. BSECC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ OMX is proposing to make certain amendments to its Charter and By-Laws.

(i) Background

At NASDAQ OMX's 2012 annual meeting held on May 22, 2012, NASDAQ OMX's stockholders considered two proposals submitted by individual stockholders. The first proposal, which passed with 68% of the votes cast, requested that NASDAQ OMX's Board take steps to replace each supermajority voting standard in the Charter and By-Laws [3] with a voting standard requiring a ''majority of votes cast.'' The second proposal, which did not pass but received 49% of the votes cast, requested that NASDAQ OMX's Board take steps to enable stockholders having at least one-tenth of NASDAQ OMX's voting power to call a special meeting of stockholders.

Following the 2012 annual meeting, the Nominating & Governance Committee of NASDAQ OMX's Board reviewed the voting results on the two stockholder proposals and discussed the stockholder voting standards and rights contemplated by the Charter and By-Laws. Following this review, the Nominating & Governance Committee recommended to the Board, and the Board approved, certain changes to the Charter and By-Laws to address the two stockholder proposals and make other changes. NASDAQ OMX now proposes to make these changes, which are described further below.

(ii) Proposed Amendments to Charter

(a) Removal and Replacement of Supermajority Voting Requirements

To respond to feedback from its stockholders, NASDAQ OMX proposes to replace each supermajority voting requirement in the Charter with a ''majority of outstanding shares'' voting requirement. The Charter currently includes the following three supermajority voting requirements.

• *Removal of Directors.* Article Fifth, Paragraph D provides that, except for directors elected by the holders of any series of preferred stock, any director, or the entire Board, may be removed from office at any time, but only by the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors (the ''Voting Stock''), voting together as a single class.

• *Adoption, Alteration, Amendment and Repeal of By-Laws.* Article Eighth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the total voting power of the outstanding Voting Stock, voting together as a single class, shall be required in order for the stockholders to adopt, alter, amend or repeal any By-Law.

• *Adoption, Alteration, Amendment and Repeal of Certain Charter Provisions.* Article Ninth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the voting power of the outstanding Voting Stock, voting together as a single class, shall be required to amend, repeal or adopt any provision inconsistent with paragraph C of Article Fourth,[4] Article Fifth,[5] Article Seventh,[6] Article Eighth,[7] or Article Ninth of the Charter.[8]

In each of the three provisions described above, NASDAQ OMX proposes to remove the requirement for an affirmative vote of at least 66⅔% of the total voting power of the Voting Stock and replace it with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock. In developing this proposal, NASDAQ OMX considered the relative weight of the arguments for and against supermajority voting requirements. Historically, supermajority voting requirements have protected corporations against coercive takeover tactics by requiring broad stockholder support for certain types of transactions or governance changes. However, in recent years, corporate governance standards have evolved, and many stockholder rights advocates argue that supermajority voting requirements limit stockholders' participation in corporate governance. NASDAQ OMX believes that while it is important to protect against coercive takeover tactics, it is also critically important to obtain stockholder input and respond to stockholder concerns about corporate governance.

NASDAQ OMX believes that the proposed ''majority of outstanding shares'' voting requirement will continue to provide some protection against proposals that are harmful to the stockholders. While this requirement is less difficult to satisfy than a supermajority voting requirement, it is more difficult to satisfy than a ''majority of votes cast'' requirement, which NASDAQ OMX considered as an alternate option. NASDAQ OMX believes that a ''majority of outstanding shares'' standard is a balanced outcome that responds to stockholder feedback while appropriately maintaining NASDAQ OMX's defensive posture against hostile takeovers.

(b) Non-Substantive Changes

NASDAQ OMX also proposes to amend and restate the Charter to make other non-substantive changes. Specifically, the proposal deletes obsolete references to the following:

• The 3.75% Series A Convertible Notes due 2012 and the 3.75% Series B Convertible Notes due 2012, which are no longer outstanding, in Article Fourth, Paragraph C and Article Eleventh;

[3] These provisions, which are described further below, require the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock to approve certain actions.

[4] Paragraph C of Article Fourth sets forth the 5% voting limitation, which provides that holders of NASDAQ OMX's voting securities may not cast votes in excess of 5% of NASDAQ OMX's outstanding voting securities. To be clear, NASDAQ OMX is not proposing any change to the 5% voting limitation itself. NASDAQ OMX only proposes that any future amendment of the 5% voting limitation will require the approval of stockholders holding a majority of the outstanding shares, rather than stockholders holding 66⅔% of the outstanding shares.

[5] Article Fifth includes certain provisions relating to the Board, such as Board size and director elections.

[6] Article Seventh prohibits stockholder action by written consent.

[7] Article Eighth establishes the procedures to adopt, alter, amend or repeal the By-Laws.

[8] Article Ninth establishes the procedures to adopt, alter, amend or repeal the Charter.

• a voting trust agreement, which is no longer in effect, in Article Fourth, Paragraph C(3)(b)(iii);
• ownership of NASDAQ OMX securities by the National Association of Securities Dealers, Inc., certain affiliates of Hellman & Friedman LLC, and certain affiliates of Silver Lake, none of which currently own any NASDAQ OMX securities, in Article Fourth, Paragraph C(6); [9] and
• the phase-out of the classified board structure, which was complete in 2007, in Article Fifth, Paragraph B.

In Article Fifth, Paragraph B, the proposal also clarifies that the election of directors by stockholders shall occur at an annual or special meeting. The proposal corrects a typographical error in Article Fifth, Paragraph A and renumbers the provisions of the Charter, where necessary following the other amendments. Finally, the proposal amends the introductory and concluding language of the Charter to incorporate language that will be required under Delaware law when the amended and restated Charter is filed with the Secretary of State of the State of Delaware.[10]

The amendment and restatement of the Charter to incorporate these non-substantive changes will simplify and streamline the document.

(iii) Proposed Elimination of Certificate of Designation

NASDAQ OMX proposes to eliminate its Certificate of Designation, Preferences and Rights of Series A Convertible Preferred Stock (the ''Series A Convertible Preferred Stock''), and all matters set forth therein. The Series A Convertible Preferred Stock was created in 2009 to facilitate the conversion of certain notes into common stock.[11] The Company authorized 2 million shares of the Series A Convertible Preferred Stock and immediately issued 1.6 million of those shares to the converting noteholders.

In 2010, following stockholder approval, all 1.6 million issued shares of the Series A Convertible Preferred Stock were converted into common stock. Since then, no shares of the Series A Convertible Preferred Stock have been outstanding, and the Company has no intention to issue further shares of this series.

As a clean-up matter, the Company seeks to file a certificate of elimination with the Secretary of State of the State of Delaware to eliminate the Series A Convertible Preferred Stock. Under Delaware law, a certificate of elimination is deemed to be an amendment to NASDAQ OMX's Charter; however, since the amendment is limited in scope, it does not require the approval of NASDAQ OMX's stockholders.[12]

(iv) Proposed Amendments to the By-Laws

(a) Special Meetings of Stockholders

Current Section 3.2 of NASDAQ OMX's By-Laws provides that only NASDAQ OMX may call special meetings of its stockholders.[13] To respond to feedback from its stockholders, as discussed above, NASDAQ OMX proposes to delete this provision and replace it with language that will allow NASDAQ OMX's stockholders to call special meetings after following particular procedures. Similar to the elimination of supermajority voting requirements, which is discussed above, the implementation of the right of stockholders to call a special meeting has received recent attention from investor and corporate governance advocates. These advocates argue that such a right will enable stockholders to raise and act on matters that arise between annual meetings.

Following discussions with some of its stockholders, NASDAQ OMX agrees that it is appropriate to allow stockholders who meet certain procedural requirements to call a special meeting. In proposing these procedural requirements, NASDAQ OMX's goals are to ensure timely notice of a meeting request and to gather sufficient information about the proposing stockholder(s) and the proposal. Among other things, this information will ensure that NASDAQ OMX is able to comply with its disclosure and other requirements under applicable law and that NASDAQ OMX, its Board and its stockholders are able to assess the proposal adequately. The proposed procedural requirements are set forth below.

First, proposed Section 3.2(a) provides that special meetings of NASDAQ OMX's stockholders may only be called: (i) At any time by NASDAQ OMX's Board pursuant to a resolution adopted by a majority of the total number of directors NASDAQ OMX would have if there were no vacancies; and (ii) by NASDAQ OMX's Corporate Secretary following the receipt of a written request in proper form for a special meeting (a ''Special Meeting Request'') by one or more stockholders. Such stockholders (the ''Requisite Holders'') must hold of record, in the aggregate, at least 15 percent of NASDAQ OMX's outstanding shares of capital stock entitled to vote on matters to be brought before the special meeting (the ''Requisite Percentage''). Such shares must be ''Net Long Shares,'' [14]

[9] NASDAQ OMX notes that the remaining text of Article Fourth, Paragraph C(6) of the Charter includes an obsolete cross-reference to Section 6(b) of Article Fourth, Paragraph C in the second sentence, which begins ''The Board, however, may not approve an exemption under Section 6(b). . . .'' NASDAQ OMX cannot correct this cross-reference, which should refer to Section 6 without further reference to a subsection (b), without seeking further approval of its stockholders, which would require NASDAQ OMX to call and hold a stockholder meeting. Generally, NASDAQ OMX holds stockholder meetings, which are time consuming and expensive, only once or twice a year. Moreover, it is atypical of a large public company like NASDAQ OMX to submit a proposal to its stockholders solely to correct a cross-reference in its Charter. However, NASDAQ OMX believes, following consultation with outside counsel, that it is clear, based on the drafting history of this provision, that the intent of the cross-reference is to refer to Section 6 of Article Fourth, Paragraph C of the Charter. In other words, the second sentence of Article Fourth, Paragraph C(6) should read: ''The Board, however, may not approve an exemption under Section 6: (i) for a registered broker or dealer or an Affiliate thereof or (ii) an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act.'' Under no circumstances will NASDAQ OMX read the obsolete cross-reference to imply that the Board could grant an exemption to the ownership limitation in Article Fourth, Paragraph C(6) of the Charter for a registered broker or dealer or an Affiliate thereof, or an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act. NASDAQ OMX also notes that it is proposing amendments to Section 12.5 of the By-Laws to eliminate cross-references to subsection (b) of Article Fourth, Paragraph C(6) of the Charter. Finally, NASDAQ OMX notes that there are some differences in language between the second sentence of Article Fourth, Paragraph C(6) of the Charter and the second sentence of Section 12.5 of the By-Laws. To the extent that these differences would cause a difference in interpretation, NASDAQ OMX notes, following consultation with outside counsel, that the Charter language shall prevail. As soon as feasible, NASDAQ OMX plans to present a proposal to the stockholders to conform this provision of the Charter to the By-Laws.

[10] *See* Sections 242 and 245 of the DGCL.

[11] *See* Securities Exchange Act Release No. 60845 (October 20, 2009), 74 FR 55078 (October 26, 2009) (SR–BX–2009–061, SR–NASDAQ–2009–087, SR–Phlx–2009–88); *see also* Securities Exchange Act Release No. 61000 (November 13, 2009), 74 FR 61390 (November 24, 2009) (SR–BSECC–2009–005); *see also* Securities Exchange Act Release No. 61001 (November 13, 2009), 74 FR 61391 (November 24, 2009) (SR–SCCP–2009–04).

[12] *See* Section 151(g) of the DGCL.

[13] Under Delaware law, special meetings of a corporation's stockholders may be called by the board of directors or by such persons as may be authorized by the certificate of incorporation or the bylaws. *See* Section 211(d) of the DGCL.

[14] For purposes of determining Requisite Holders under proposed Section 3.2, ''Net Long Shares'' shall be limited to the number of shares beneficially owned, directly or indirectly, by any stockholder or beneficial owner that constitute such person's ''net long position'' as defined in Rule 14e–4 under the Act, provided that (A) for the purposes of this definition, references in the rule to ''the date the tender offer is first publicly announced or otherwise made known by the bidder to the holders of the

Continued

and the Requisite Holders must have held the shares continuously for at least one year as of the date of the Special Meeting Request. Whether shares constitute Net Long Shares shall ultimately be decided by NASDAQ OMX's Board in its reasonable determination. The intent of the requirement for stockholders to maintain a ''net long position'' is to limit the ability to call a special meeting to stockholders that have long-term record and economic positions in NASDAQ OMX.

Proposed Section 3.2(a) also sets forth the procedures for determining whether a special meeting has been requested by Requisite Holders representing in aggregate at least the Requisite Percentage if multiple Special Meeting Requests are delivered to NASDAQ OMX's Corporate Secretary. Multiple requests will be considered together only if: (i) Each Special Meeting Request identifies substantially the same purpose or purposes of the special meeting and substantially the same matters proposed to be acted on at the requested special meeting (in each case as determined in good faith by NASDAQ OMX's Board); and (ii) such Special Meeting Requests have been dated and delivered to NASDAQ OMX's Corporate Secretary within 60 days of the earliest dated Special Meeting Request. NASDAQ OMX believes these procedures are reasonable and clear and notes that they grant only limited discretion to NASDAQ OMX's Board in determining whether Special Meeting Requests will be considered together.

Pursuant to proposed Section 3.2(b), if a Special Meeting Request is in proper form, NASDAQ OMX's Board shall determine the place, if any, date and time of the special meeting, and NASDAQ OMX's Corporate Secretary shall call the special meeting within 120 days after the date the Special Meeting Request was delivered. However, NASDAQ OMX's Board may, in lieu of calling a special meeting, present an identical or substantially similar item of business (a ''Similar Item''),[15] as determined in good faith by NASDAQ OMX's Board, for stockholder approval at any other meeting of the stockholders that is held not less than 120 days after the delivery of the Special Meeting Request. The intent of this provision is to save NASDAQ OMX the time and expense of calling and holding a special meeting if NASDAQ OMX intends to hold a separate stockholders' meeting within 120 days. In fixing the place, if any, date and time for any special meeting, NASDAQ OMX's Board may consider such factors as it deems relevant in its business judgment, including the nature of the matters to be considered, the facts and circumstances surrounding any request for a meeting and any plan of the Board to call an annual meeting or a special meeting.

Proposed Section 3.2(c) sets forth certain limitations on Special Meeting Requests. Specifically, a Special Meeting Request will not be valid if:

- It relates to an item of business that is not a proper subject for stockholder action under applicable law;
- it is delivered during the period commencing 90 days prior to the one-year anniversary of the date of the immediately preceding annual meeting and ending on the date of the next annual meeting;
- a Similar Item was presented at any meeting of stockholders held within 120 days prior to the date on which the Special Meeting Request was delivered; or
- a Similar Item is included in NASDAQ OMX's notice of meeting as an item of business to be presented at a stockholder's meeting that has been called but not yet held.

The Board may adjourn or reschedule any previously scheduled special meeting of the stockholders. NASDAQ OMX believes the subject matter limitations set forth in proposed Section 3.2(c) are appropriate in order to comply with applicable law and to prevent multiple considerations of the same item of business. NASDAQ OMX believes the time limits set forth in proposed Section 3.2(c) are appropriate to ensure that NASDAQ OMX is not required to incur the time and expense of calling and holding a special meeting of stockholders immediately prior to an upcoming annual meeting of stockholders or if a Similar Item of business already has been presented at a recent stockholders' meeting.

To be in proper form, a Special Meeting Request must comply with certain requirements, as described further below.[16] NASDAQ OMX's Board will have the sole discretion to determine whether a Special Meeting Request is in proper form.[17] Proposed Section 3.2(d) sets forth the requirements for a Special Meeting Request to be in proper form. These proposed requirements will ensure that NASDAQ OMX has sufficient information to comply with its disclosure requirements under applicable law and that the Requisite Holders maintain a sufficient ownership level through the date of the special meeting. Specifically, a Special Meeting Request shall:

- Be in writing, signed by each Requesting Person [18] and delivered to NASDAQ OMX's Corporate Secretary at NASDAQ OMX's principal executive offices;
- set forth certain information with respect to (i) each person the Requesting Person proposes to nominate for director, (ii) any business the Requesting Person proposes to bring before the meeting and (iii) each Requesting Person; [19] and
- include (i) an agreement by each Requisite Holder to immediately deliver written notice to NASDAQ OMX's Corporate Secretary in the case of any disposition, on or prior to the record date for the special meeting, of any shares of NASDAQ OMX's capital stock held of record by such Requisite Holder and (ii) an acknowledgement that (1) any such disposition shall be deemed a revocation of the Special Meeting Request to the extent of such disposition and (2) if, following such deemed revocation, the Requisite Holders hold of record, in the aggregate, less than the Requisite Percentage of the voting power of all outstanding shares of

security to be acquired'' shall be the date of the relevant Special Meeting Request and all dates in the one year period prior thereto, the ''highest tender offer price or stated amount of the consideration offered for the subject security'' shall refer to the closing sales price of NASDAQ OMX's capital stock on NASDAQ on such date (or, if such date is not a trading day, the next succeeding trading day), the ''person whose securities are the subject of the offer'' shall refer to NASDAQ OMX, a ''subject security'' shall refer to the issued and outstanding voting stock of NASDAQ OMX; and (B) the net long position of such stockholder shall be reduced by any shares as to which such person does not have the right to vote or direct the vote at the proposed special meeting or as to which such person has entered into a derivative or other agreement, arrangement or understanding that hedges or transfers, in whole or in part, directly or indirectly, any of the economic consequences of ownership of such shares. In addition, to the extent any affiliates of the stockholder or beneficial owner are acting in concert with the stockholder or beneficial owner with respect to the calling of the special meeting, the determination of Net Long Shares may include the effect of aggregating the Net Long Shares (including any negative number) of such affiliate or affiliates. *See* proposed Section 3.2(a) of the By-Laws.

[15] Under proposed Section 3.2(b) of the By-Laws, the election of directors shall be deemed a ''Similar Item'' with respect to all items of business involving the nomination, election or removal of directors.

[16] *See* proposed Section 3.2(a) of the By-Laws.

[17] *Id.*

[18] ''Requesting Person'' means (i) each Requisite Holder, (ii) the beneficial owner or beneficial owners, if different, on whose behalf the Special Meeting Request is being delivered to NASDAQ OMX's Corporate Secretary and (iii) any affiliate or associate of such stockholder or beneficial owner. *See* proposed Section 3.2(e) of the By-Laws.

[19] The information required is the same information required from Proposing Persons with respect to nominations or items of business to be brought before an annual meeting of stockholders and is described in detail in Section (iv)(b) below.

NASDAQ OMX's capital stock entitled to vote generally in the election of directors, NASDAQ OMX shall have no obligation to hold the special meeting.

Proposed Section 3.2(f) provides that at any special meeting of the stockholders, the only business to be conducted or considered will have been specified in the notice of meeting (or any supplement thereto) given by or at the direction of NASDAQ OMX's Board or Corporate Secretary, as the case may be. In any event, however, NASDAQ OMX's Board may submit its own proposal or proposals for consideration at a special meeting. Except as otherwise allowed under proposed Section 3.2, stockholders will not be permitted to propose business to be brought before a special meeting of the stockholders. NASDAQ OMX believes these provisions are reasonable and necessary to limit the items of business that may be considered at a special meeting to those that were proposed by the Company, the Board or stockholders that comply with the requirements and procedures set forth in the By-Laws.

Proposed Section 3.2(g) will require the Requisite Holders giving a Special Meeting Request to further update and supplement the request, if necessary, so that the information in the request is true and correct as of the record date for the special meeting and as of the 10th business day prior to the special meeting or any adjournment or postponement thereof. This requirement will ensure that NASDAQ OMX, its Board and its other stockholders are notified of changes to the information they will consider in assessing a proposed item of business prior to the special meeting. In the case of an update and supplement required to be made as of the record date, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the fifth business day after the record date for the special meeting. In the case of an update and supplement required to be made as of the 10th business day prior to the special meeting or any adjournment or postponement thereof, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the eighth business day prior to the date for the special meeting or, if practical, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the special meeting has been adjourned or postponed).

Proposed Section 3.2(h) will allow the Requisite Holders to revoke a Special Meeting Request by written revocation delivered to NASDAQ OMX at any time prior to the special meeting requested. However, NASDAQ OMX's Board will have the discretion to determine whether or not to proceed with the special meeting. The Board might wish to continue with the special meeting if, for example, the Company has already spent the time and expense required to call the meeting or if the agenda for the meeting includes items other than those proposed in the Special Meeting Request.

Finally, NASDAQ OMX proposes to designate as Section 3.2(i) existing text that sets forth the requirements for stockholders to submit nominees for election as directors at certain stockholder meetings. NASDAQ OMX further proposes to make a minor change to this text to clarify that NASDAQ OMX's Board, rather than the Company itself, will call a special meeting on behalf of the Company.

(b) Annual Meetings of Stockholders

Section 3.1 of NASDAQ OMX's By-Laws, which is the ''advance notice'' provision,[20] requires stockholders to notify NASDAQ OMX, during a specified period in advance of an annual meeting, of their intention to nominate one or more persons for election to the Board or to present a business proposal for consideration by the stockholders at the meeting. While designing the proposed procedural requirements for stockholders to call a special meeting, as outlined above, NASDAQ OMX evaluated the existing procedural requirements for stockholders to bring business before an annual meeting. NASDAQ OMX is therefore proposing changes to some of these procedures to enhance them and conform them, in some cases, to the procedures relating to special meetings. Generally, the proposed amendments add requirements for extensive disclosures by proposing stockholders about themselves, any proposed nominees for director and any proposed items of business to be brought before a meeting. The specific amendments are discussed in detail below.

First, Section 3.1(a) of the By-Laws currently states that nominations of persons for election to NASDAQ OMX's Board and the proposal of other business to be considered by the stockholders at an annual meeting of stockholders may be made only: (i) Pursuant to the Company's notice of meeting (or any supplement thereto); (ii) by or at the direction of NASDAQ OMX's Board or its Nominating & Governance Committee; or (iii) by any stockholder of the Company that meets certain requirements. These requirements state that the stockholder must: (i) Be a stockholder of record at the time of delivery of notice to the Company of nominees or other business to be conducted at the meeting; (ii) be entitled to vote at the meeting; and (iii) comply with the notice procedures set forth in the By-Laws. NASDAQ OMX proposes to add a parenthetical to the requirement that a stockholder must be a stockholder of record to clarify that a nomination or proposal of other business may be made on behalf of a beneficial owner, if different from the stockholder of record, only if the beneficial owner is the beneficial owner of NASDAQ OMX shares. This modification will clarify that both record and beneficial owners of NASDAQ OMX stock have the right to propose nominees or business to be considered at an annual meeting. NASDAQ OMX further proposes that a stockholder who proposes nominees or business to be considered at an annual meeting must hold shares in the Company at the time of the meeting, in addition to the time of delivery of the required notice to the Company. This will ensure that a stockholder retains an interest in the Company until the meeting at which the stockholder's nominee or other business is considered. Finally, NASDAQ OMX proposes to number the procedural requirements for stockholders who propose nominees or business to make them easier to understand.

Currently, Section 3.1(b) of the By-Laws sets forth the requirements for a stockholder's notice to NASDAQ OMX of nominations or other business to be considered at an annual meeting. NASDAQ OMX proposes certain amendments to this section to ensure that NASDAQ OMX has sufficient information about such nominations or other business proposed by a stockholder to enable the Company, the Board and the other stockholders to assess a position on the nominations or other business. The additional information requirements will also ensure that NASDAQ OMX can make adequate disclosures to its stockholders and comply with requirements under applicable law.

Specifically, NASDAQ OMX proposes an amendment to the first paragraph of this section to require a stockholder who provides a notice relating to a

[20] ''Advance notice'' provisions allow stockholder(s) to bring business before an annual meeting of stockholders, but set forth procedural requirements to ensure that companies and boards have sufficient information about the proposal and the proposing stockholder(s), as well as adequate time to consider the proposal, by requiring the proposing stockholder(s) to give advance notice of the intention to bring the proposal before the annual meeting.

nomination to include with the notice, a completed and signed questionnaire, representation and agreement relating to the nominee(s) for director.[21] NASDAQ OMX also proposes to require a stockholder who provides a notice to further update and supplement the notice, if necessary, so that the information in the notice is true and correct as of the record date for the annual meeting and as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof.[22] This requirement will ensure that NASDAQ OMX, its Board and its other stockholders are notified of changes to the information they will consider in assessing a proposed item of business prior to the annual meeting. In the case of an update and supplement required to be made as of the record date, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the fifth business day after the record date for the annual meeting. In the case of an update and supplement required to be made as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the eighth business day prior to the date for the annual meeting or, if practicable, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the annual meeting has been adjourned or postponed).

Section 3.1(b)(i) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ OMX about each person whom the stockholder proposes to nominate for election as a director. NASDAQ OMX proposes changes to this section to use the defined term ''Proposing Person'' instead of stockholder,[23] to require information with respect to nominees for reelection as well as nominees for election, to correct a reference to the Act and to add numbering and other organizational changes to make the requirements easier to read and understand. NASDAQ OMX also proposes to require the same information with respect to a proposed nominee that will be required with respect to a Proposing Person, as discussed further below. In addition, NASDAQ OMX proposes to add two new informational requirements for proposed nominees, including:

- A description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships, between or among any Proposing Person, on the one hand, and such proposed nominee and any of his or her respective affiliates and associates, on the other hand, including, without limitation, all information that would be required to be disclosed pursuant to Item 404 under Regulation S–K if such Requesting Person were the ''registrant'' for purposes of such rule and the proposed nominee were a director or executive officer of such registrant; and
- a completed and signed questionnaire, representation and agreement.[24]

Finally, NASDAQ OMX proposes to add a catch-all provision to Section 3.1(b)(i) of the By-Laws that will allow the Company to require any proposed nominee to furnish such other information (i) as the Company may reasonably require to determine the eligibility of such proposed nominee to serve as a director or (ii) that could be material to a reasonable stockholder's understanding of the independence, or lack of independence, of such proposed nominee. NASDAQ OMX believes that all of the new information requirements included in proposed Section 3.1(b)(i) are reasonable and necessary in order to assist the Company in evaluating director eligibility, independence and potential conflicts of interest.

Section 3.1(b)(ii) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ OMX about any business, other than nominations for director, that the stockholder proposes to bring before an annual meeting. NASDAQ OMX proposes changes to this section to require that the description of the proposed business be reasonably detailed, to use the defined term ''Proposing Person'' instead of stockholder and beneficial owner in certain places and to add numbering, reordering and other organizational changes to make the requirements easier to read and understand. NASDAQ OMX also proposes to add a new requirement for a stockholder to provide a reasonably detailed description of all contracts, agreements, arrangements and understandings between or among any of the Proposing Persons or between or among any Proposing Person in connection with the proposal. NASDAQ OMX believes this information will be useful in assessing the aims and incentives of Proposing Persons in proposing business before an annual meeting.

Section 3.1(b)(iii) of the By-Laws currently sets forth the information that a stockholder who proposes nominee(s) for director or other business to be put forth before an annual meeting must provide to NASDAQ OMX about such stockholder and the beneficial owner, if any, on whose behalf the nomination or proposal is made. NASDAQ OMX proposes changes to this section to use the defined term ''Proposing Person'' instead of stockholder and beneficial owner in certain places and to add numbering, reordering and other organizational changes to make the requirements easier to read and understand.

Relating to the existing requirement in Section 3.1(b)(iii)(B) that a proposing stockholder describe the class or series and number of shares of NASDAQ OMX capital stock owned beneficially and of record by such stockholder and the beneficial owner, NASDAQ OMX proposes to add a parenthetical stating that beneficial ownership shall be determined within the meaning of Rule 13d-3 under the Act. NASDAQ OMX also proposes to state that a Proposing Person shall in all events be deemed to beneficially own any shares of any class or series of NASDAQ OMX's capital stock as to which such person has a right to acquire beneficial ownership at any time in the future. These proposed changes merely clarify how the concept of beneficial ownership will be interpreted under this section of the By-Laws.

Current Section 3.1(b)(iii)(D) requires proposing stockholders to describe to NASDAQ OMX any agreement, arrangement or understanding (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares) that has been entered into as of the date of the notice by the stockholder

[21] The contents of and rationale for the questionnaire, representation and agreement are discussed further in Section (iv)(c) below.

[22] NASDAQ OMX notes that this proposal is similar to proposed Section 3.2(g) of the By-Laws, which requires updates and supplements to a stockholder notice relating to a special meeting. This proposed change is discussed further in Section (iv)(a) above.

[23] ''Proposing Person'' means (i) the stockholder providing the notice of business or the notice of the nomination, as applicable, proposed to be brought before an annual meeting, (ii) any beneficial owner or beneficial owners, if different, on whose behalf such business is proposed to be brought before the meeting or the notice of the nomination proposed to be made at the meeting is made, as applicable, and (iii) any affiliate or associate (each within the meaning of Rule 12b–2 under the Act for purposes of the By-Laws) of such stockholder or beneficial owner. *See* proposed Section 3.1(c) of the By-Laws.

[24] The contents of and rationale for the questionnaire, representation and agreement are discussed further in Section (iv)(c) below.

and the beneficial owners with respect to NASDAQ OMX's stock. Given the increased complexity of such transactions in today's marketplace, NASDAQ OMX proposes to replace the current language with a similar requirement for disclosure of any Synthetic Equity Interest,[25] without regard to whether: (i) The derivative, swap or other transaction or series of transactions conveys any voting rights in such shares to the Proposing Person; (ii) the derivative, swap or other transaction or series of transactions is required to be, or is capable of being, settled through delivery of such shares; or (iii) the Proposing Person may have entered into other transactions that hedge or mitigate the economic effect of such derivative, swap or other transaction or series of transactions. This proposed provision will assist NASDAQ OMX, its Board and its other stockholders in understanding a Proposing Person's full economic interests in NASDAQ OMX and possible aims and incentives in submitting the proposed business for consideration at an annual meeting.

For this same reason, NASDAQ OMX also proposes to add several new disclosures that a Proposing Person must include in a notice to NASDAQ OMX regarding nominees or other business to be conducted at an annual meeting. These include disclosures regarding:

- Any proxy (other than a revocable proxy or consent given in response to a solicitation made pursuant to, and in accordance with, Section 14(a) of the Act by way of a solicitation statement filed on Schedule 14A), agreement, arrangement, understanding or relationship pursuant to which the Proposing Person has or shares a right to vote any shares of any class or series of NASDAQ OMX;[26]
- any proportionate interest in NASDAQ OMX shares or Synthetic Equity Interest held, directly or indirectly, by a general or limited partnership in which the Proposing Person is a general partner or, directly or indirectly, beneficially owns an interest in a general partner;[27]
- any agreement, arrangement, understanding or relationship, including any repurchase or similar so-called ''stock borrowing'' agreement or arrangement, entered into or engaged in, directly or indirectly, by the Proposing Person, the purpose or effect of which is to mitigate loss to, reduce the economic risk (of ownership or otherwise) of shares of any class or series of NASDAQ OMX by, manage the risk of share price changes for, or increase or decrease the voting power of, the Proposing Person with respect to shares of any class or series of NASDAQ OMX, or that provides, directly or indirectly, the opportunity to profit from any decrease in the price or value of shares of any class or series of NASDAQ OMX (any of the foregoing, a ''Short Interest'');[28]
- any performance-related fees (other than an asset-based fee) to which the Proposing Person is entitled based on any increase or decrease in the price or value of shares of any class or series of NASDAQ OMX, or any Synthetic Equity Interest or Short Interest;[29]
- any significant equity interest or any Synthetic Equity Interest or Short Interest in any principal competitor of NASDAQ OMX held by the Proposing Person;[30]
- any direct or indirect interest of the Proposing Person in any contract with NASDAQ OMX, any affiliate of NASDAQ OMX or any principal competitor of NASDAQ OMX (including, in any such case, any employment agreement, collective bargaining agreement or consulting agreement);[31]
- any pending or threatened litigation in which the Proposing Person is a party or material participant involving NASDAQ OMX or any of its officers or directors, or any affiliate of NASDAQ OMX;[32]
- any material transaction occurring, in whole or in part, during the then immediately preceding 12-month period between such Proposing Person, on the one hand, and NASDAQ OMX, any affiliate of NASDAQ OMX or any principal competitor of NASDAQ OMX, on the other hand;[33] and
- any other information relating to the Proposing Person required to be disclosed in a proxy statement or other filings required to be made in connection with solicitations of proxies for, as applicable, the proposal and/or for the election of directors in an election contest pursuant to and in accordance with Section 14(a) of the Act and the rules and regulations promulgated thereunder.[34]

(c) Questionnaire, Representation and Agreement for Director-Nominees

NASDAQ OMX proposes to add a new Section 3.5 to its By-Laws to require nominees for director to deliver to NASDAQ OMX, in accordance with the time periods prescribed for delivery of a stockholder's notice: (i) A written questionnaire with respect to the background and qualifications of the nominee; and (ii) a written representation and agreement as to certain matters. Specifically, the written representation and agreement will provide that the nominee:

- Is not and will not become a party to (i) any agreement as to how the nominee will act or vote on any issue or question (a ''Voting Commitment'') that has not been fully disclosed to NASDAQ OMX or (ii) any Voting Commitment that could limit or interfere with the nominee's fiduciary duties under applicable law;
- is not and will not become a party to any agreement with any person other than NASDAQ OMX with respect to any direct or indirect compensation, reimbursement or indemnification in connection with service or action as a director of NASDAQ OMX that has not been fully disclosed to NASDAQ OMX;
- would be in compliance, if elected, and will comply, with the provisions of NASDAQ OMX's By-Laws relating to qualifications of directors, conflicts of interest and contracts and transactions involving directors; and
- in such proposed nominee's individual capacity and on behalf of any person on whose behalf the nomination is made, would be in compliance, if

[25] ''Synthetic Equity Interest'' shall mean any derivative, swap or other transaction (including any short positions, profit interest, options, warrants, convertible securities, stock appreciation or similar rights) or series of transactions engaged in, directly or indirectly, by a Proposing Person, the purpose or effect of which is to give the Proposing Person economic risk similar to ownership of shares of any class or series of NASDAQ OMX, including due to the fact that the value of such derivative, swap or other transaction or series of transactions is determined by reference to the price, value or volatility of any shares of any class or series of NASDAQ OMX, or which derivative, swap or other transaction or series of transactions provides, directly or indirectly, the opportunity to profit from any increase in the price or value of shares of any class or series of NASDAQ OMX. *See* proposed Section 3.1(b)(iii)(D) of the By-Laws.

[26] *See* proposed Section 3.1(b)(iii)(E) of the By-Laws.

[27] *See* proposed Section 3.1(b)(iii)(F) of the By-Laws.

[28] *See* proposed Section 3.1(b)(iii)(G) of the By-Laws.

[29] *See* proposed Section 3.1(b)(iii)(H) of the By-Laws.

[30] *See* proposed Section 3.1(b)(iii)(I) of the By-Laws.

[31] *See* proposed Section 3.1(b)(iii)(J) of the By-Laws.

[32] *See* proposed Section 3.1(b)(iii)(K) of the By-Laws.

[33] *See* proposed Section 3.1(b)(iii)(L) of the By-Laws.

[34] *See* proposed Section 3.1(b)(iii)(M) of the By-Laws. NASDAQ OMX also proposes to include an exception to each of the aforementioned disclosure requirements for any disclosures with respect to the ordinary course business activities of any broker, dealer, commercial bank, trust company or other nominee who is a Proposing Person solely as a result of being the stockholder directed to prepare and submit the notice required by the By-Laws on behalf of a beneficial owner.

elected, and will comply, with NASDAQ OMX's Corporate Governance Guidelines, Board of Director Code of Conduct and Code of Ethics, including all applicable, publicly disclosed conflict of interest, confidentiality, stock ownership and insider trading policies and guidelines.

The requirements of proposed Section 3.5 of the By-Laws, which will apply to both the Company's and stockholders' nominees for director, will ensure that NASDAQ OMX has the necessary information about nominees to fulfill its public disclosure requirements. The requirements also will ensure that nominees will comply with the legal obligations, policies and procedures applicable to all NASDAQ OMX directors.

(d) Removal and Replacement of Supermajority Voting Provisions

Consistent with the proposed amendments to remove and replace the supermajority voting provisions in the Charter discussed above, NASDAQ OMX proposes to amend each provision of the By-Laws that currently requires a supermajority vote of stockholders to instead require a ''majority of votes outstanding.'' NASDAQ OMX's By-Laws currently include the following two supermajority voting requirements, each of which conforms with an analogous provision in the Charter.

• *Removal of Directors.* Section 4.6 provides that any or all of the directors may be removed from office at any time by the affirmative vote of at least 66⅔% of the total voting power of the Voting Stock, voting together as a single class.[35]

• *Adoption, Alteration, Amendment and Repeal of By-Laws.* Section 11.1 provides that the By-Laws may be altered amended or repealed, or new By-Laws may be adopted, at any meeting of the stockholders by the affirmative vote of the holders of at least 66⅔% of the voting power of the Voting Stock, voting together as a single class.[36]

To conform with the proposed changes to the Charter, NASDAQ OMX proposes to replace each of these supermajority voting requirements with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock. As discussed above with respect to the analogous Charter amendments, NASDAQ OMX believes that a ''majority of outstanding shares'' standard reflects a balanced approach that responds to stockholder feedback while appropriately maintaining NASDAQ OMX's defensive posture against hostile takeovers.

(e) Procedures for Filling Board Vacancies

Section 4.8 of the By-Laws sets forth the procedures to fill a director position that has become vacant, whether because of death, disability, disqualification, removal or resignation. Under the current provisions, if such a vacancy occurs, the Nominating & Governance Committee of the Board shall nominate, and the Board shall elect by majority vote, a person to fill the vacancy. In light of the addition of a right for stockholders to call a special meeting, as discussed above, NASDAQ OMX proposes amendments to Section 4.8 to state explicitly that vacancies on the Board are to be filled by a majority vote of the Board, and not by stockholders. In addition, to prescribe procedures in case multiple Board vacancies occur at the same time, the proposed amendments state that a Board vacancy shall be filled by the majority of the directors, even if there is less than a quorum, or by the sole remaining director, if there is only one director remaining on the Board. The proposed amendments do not change any of the other procedures for filling Board vacancies.

(f) Use of Electronic Means for Certain Notices and Related Waivers

Currently, Section 4.12(a) of the By-Laws provides that notice of any meeting of the Board shall be deemed duly given to a director if, among other methods, the notice is sent to the director at the address last made known in writing to NASDAQ OMX by telegraph, telefax, cable, radio or wireless. Section 4.12(b) of the By-Laws provides that such notice of a board meeting need not be given to any director if waived by the director in writing or by electronic transmission (or by telegram, telefax, cable, radio or wireless and subsequently confirmed in writing or by electronic transmission). NASDAQ OMX proposes amendments to Sections 4.12(a) and (b) to provide that both notices and waivers of such notices can be given by email or other means of written electronic transmission. These amendments are intended merely to expand the means through which notices and waivers of notices may be given, and the amendments do not affect any of the other procedural requirements of Sections 4.12(a) and (b). In addition, the proposed amendments reflect current practices, as a substantial amount of communications between NASDAQ OMX and its directors, outside of Board meetings, occurs through electronic means.

(g) Composition of the Management Compensation Committee

As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act and Rule 10C–1 under the Exchange Act,[37] NASDAQ recently amended its listing rules relating to compensation committees.[38] Since NASDAQ OMX is listed on NASDAQ, it must comply with these listing rules just like any other listed company. NASDAQ OMX therefore proposes amendments to Section 4.13(f) of the By-Laws, which relates to the composition of the Management Compensation Committee of NASDAQ OMX's Board, to conform to the recent amendments to NASDAQ's listing rules. Specifically, NASDAQ OMX proposes to state that the Management Compensation Committee must consist of at least two members and that each member shall meet the eligibility requirements set forth in the rules of The NASDAQ Stock Market.

(h) No Amendment or Repeal of Certain By-Law Amendments

While current Section 11.1 of the By-Laws provides for alteration, amendment, repeal and adoption of By-Laws by the stockholders, current Section 11.2 provides for alteration, amendment, repeal and adoption of By-Laws by the Board. These two sections operate as alternate means to alter, amend, repeal or adopt By-Laws. In other words, the stockholders may alter, amend, repeal or adopt By-Laws without any action by the Board, and vice versa. NASDAQ OMX proposes to add a proviso to Section 11.2 to state that no By-Law adopted by the stockholders shall be amended or repealed by the Board if the By-Law so adopted so provides. This is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholder action to amend or repeal the By-Laws.

(i) Non-Substantive Changes

The remaining proposed By-Law amendments are non-substantive changes, which will simplify and

[35] This provision is analogous to Article Fifth, Paragraph D of the Charter, which is discussed under Section (ii)(a) above.

[36] This provision is analogous to Article Eighth, Paragraph A of the Charter, which is discussed under Section (ii)(a) above.

[37] *See* Public Law 111–203, 124 Stat. 1376 (2010) and 17 CFR 240.10C–1.

[38] *See* Securities Exchange Act Release No. 68640 (January 11, 2013), 78 FR 4554 (January 22, 2013) (SR–NASDAQ–2012–109). Among other things, the amendments require each NASDAQ-listed company, with certain exceptions, to have a compensation committee of its board of directors, consisting of a minimum of two independent directors who meet additional eligibility requirements relating to compensatory fees and affiliation.

streamline the document. Specifically, NASDAQ OMX proposes minor changes to Section 3.3 to incorporate the new defined term ''Proposing Person,'' to use the term ''nomination'' rather than ''nominee'' for consistency and to correct two cross-references. NASDAQ OMX also proposes to delete obsolete references to the 3.75% Series A Convertible Notes due 2012 and the Series B Convertible Notes due 2012, which are no longer outstanding, in Section 12.7.

In addition, NASDAQ OMX proposes to correct typographical errors and/or delete obsolete cross-references in Article I(f), Section 4.3, Section 9.4(b), Section 12.5 and Section 12.6. Finally, NASDAQ OMX proposes to renumber and reorganize the provisions of the By-Laws, where necessary following the other amendments.

2. Statutory Basis

BSECC believes that its proposal is consistent with Section 17A(b)(3)(C) of the Act,[39] in that it assures a fair representation of shareholders and participants in the selection of directors and administration of its affairs. While the proposals relate to the organizational documents of NASDAQ OMX, rather than BSECC, BSECC is indirectly wholly owned by NASDAQ OMX, and therefore, NASDAQ OMX's stockholders have an indirect stake in BSECC. In addition, the participants in BSECC, to the extent any exist, could purchase stock in NASDAQ OMX in the open market, just like any other stockholder. The proposals respond directly to feedback from existing NASDAQ OMX stockholders about their participation in NASDAQ OMX's governance. As a result, NASDAQ OMX believes that the proposals assure a fair representation of its stockholders in the selection of directors and administration of its affairs, as well as the affairs of BSECC.

Specifically, in response to feedback from its existing investors, NASDAQ OMX is proposing changes to its Charter to replace each supermajority voting requirement with a ''majority of outstanding shares'' voting standard. NASDAQ OMX believes this approach will strike an appropriate balance between responding to stockholder feedback and protecting the Company and its investors against hostile takeovers. In addition, the clarifying changes to the Charter will make the Charter more concise and easier to understand. Both sets of changes to the Charter were approved by NASDAQ OMX's investors at the most recent annual meeting of stockholders.

NASDAQ OMX also proposes to eliminate the Certificate of Designation relating to the Series A Convertible Preferred Stock, which is no longer outstanding. This proposed change will enhance the clarity of NASDAQ OMX's Charter.

Finally, NASDAQ OMX proposes changes to its By-Laws: (i) To implement a stockholder right to call a special meeting; (ii) to enhance the ''advance notice'' procedures; (iii) to require certain information and agreements from director-nominees; (iv) to remove and replace the supermajority voting provisions to conform to the Charter amendments; (v) to clarify the procedures for filling Board vacancies; (vi) to allow the use of electronic means for certain notices and waivers; (vii) to conform the composition requirements for the Management Compensation Committee of NASDAQ OMX's Board with the NASDAQ listing rules; (vii)[sic] to prevent the Board from amending or repealing By-Law amendments approved by the stockholders; and (viii)[sic] to make other non-substantive changes.

The proposals relating to the stockholder right to call a special meeting and to remove and replace the supermajority voting requirements are responsive to feedback from NASDAQ OMX's stockholders. The additional procedural requirements relating to special and annual meetings will state clearly and explicitly the procedures stockholders must follow to propose business at such meetings. The requirement for certain information and agreements from director-nominees will ensure that nominees provide adequate information about themselves and also comply with applicable law and certain NASDAQ OMX policies and procedures relating to the Board. The prohibition on the Board amending or repealing By-Law amendments approved by the stockholders is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholders' wishes. Finally, the remaining changes are clarifying in nature, and they conform NASDAQ OMX's governance documents to current practices and applicable rules and make them clearer and easier to understand.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of NASDAQ OMX and not to the operations of BSECC, BSECC does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which BSECC consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BSECC–2013–001 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BSECC–2013–001. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).*

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the

[39] 15 U.S.C. 78q–1(b)(3)(C).

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of BSECC. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–BSECC–2013–001 and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–29616 Filed 12–11–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71015; File No. SR–NYSEMKT–2013–98]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Amex Options Fee Schedule To Include FLEX Option Transactions in the Strategy Execution Fee Cap

December 6, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 26, 2013, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Amex Options Fee Schedule (''Fee Schedule'') to include FLEX Option transactions in the strategy execution fee cap. The Exchange proposes to implement the fee change effective December 1, 2013.[4] The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to include FLEX Option transactions in the strategy execution fee cap. The Exchange proposes to implement the fee change effective December 1, 2013.

A $750 cap currently applies to transaction fees for strategy executions involving (a) reversals and conversions, (b) box spreads, (c) short stock interest spreads, (d) merger spreads, and (e) jelly rolls.[5] Transaction fees for strategy executions are further capped at $25,000 per month per initiating firm. The fee cap generally applies to all strategy executions executed in standard option contracts (as opposed to mini option contracts) on the same trading day in the same option class. However, several types of transactions are excluded from the fee cap, including transactions in FLEX Options.[6]

The Exchange proposes to eliminate the exclusion of FLEX Option transactions from the strategy execution fee cap. As a result, a FLEX Option transaction that is part of a strategy execution and that is not otherwise excluded would be included in the fee cap. The proposed change is designed to encourage ATP Holders to engage in both additional FLEX Option transactions and strategy executions on the Exchange. The proposed change is also designed to compete with other markets that apply similar fee caps but that do not exclude FLEX Option transactions from such fee caps.[7]

The proposed change is not otherwise intended to address any other issues, and the Exchange is not aware of any problems that ATP Holders would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[9] in particular, because it provides for the equitable allocation of reasonable dues, fees, and

[40] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange notes that it has previously filed with the Securities and Exchange Commission a proposed rule change to amend the Fee Schedule relating to co-location fees (File No. SR–NYSEMKT–2013–97). Exhibit 5 to SR–NYSEMKT–2013–97 specified an effective date for the revised Fee Schedule of December 3, 2013 (changed from November 8, 2013). Exhibit 5 to the instant proposed rule change specifies an effective date of December 1, 2013 (changed from November 8, 2013). On December 1, 2013, the Exchange will update the Fee Schedule to reflect the fee change reflected in the instant proposed rule change, with an effective date of December 1, 2013. On December 3, 2013, the Exchange, subject to effectiveness of SR–NYSEMKT–2013–97, will further update the Fee Schedule to reflect the changes set forth in SR–NYSEMKT–2013–97, with an effective date of December 3, 2013.

[5] A ''reversal'' is established by combining a short security position with a short put and a long call position that shares the same strike and expiration. A ''conversion'' is established by combining a long position in the underlying security with a long put and a short call position that shares the same strike and expiration. A ''box spread'' is defined as transactions involving a long call option and a short put option at one strike, combined with a short call option and long put at a different strike, to create synthetic long and synthetic short stock positions, respectively. A ''short stock interest spread'' is defined as transactions done to achieve a short stock interest arbitrage involving the purchase, sale and exercise of in-the-money options of the same class. A ''merger spread'' is defined as transactions done to achieve a merger arbitrage involving the purchase, sale and exercise of options of the same class and expiration date, each executed prior to the date on which shareholders of record are required to elect their respective form of consideration, i.e., cash or stock. A ''jelly roll'' is created by entering into two separate positions simultaneously. One position involves buying a put and selling a call with the same strike price and expiration. The second position involves selling a put and buying a call, with the same strike price, but with a different expiration from the first position.

[6] A FLEX Option is a customized options contract. *See, e.g.,* NYSE Amex Options Rule 900G.

[7] For example, the Exchange understands that the Chicago Board Options Exchange, Incorporated (''CBOE'') includes FLEX Option transactions in certain of the fee caps that apply on that market.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed change is reasonable because including FLEX Option transactions in the strategy execution fee cap may encourage ATP Holders to execute additional FLEX Options and strategy executions on the Exchange. The proposed change would therefore result in greater amounts of liquidity on the Exchange, which should benefit the quality of the Exchange's market and investors, generally. This proposed change is further reasonable because the Exchange understands that other option markets similarly include FLEX Option transactions in certain fee caps applicable to strategy executions on such other markets.[10] The Exchange believes that the proposed change is equitable and not unfairly discriminatory because FLEX Options are not differentiated from other transactions for purposes of other pricing categories within the Fee Schedule. The proposed change would therefore eliminate a potential disincentive for ATP Holders to transact in FLEX Options on the Exchange while at the same time encouraging ATP Holders to engage in additional strategy executions.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[11] the Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change could increase competition on the Exchange by including FLEX Option transactions in the strategy execution fee cap. This could result in ATP Holders engaging in both additional FLEX Option transactions and strategy executions in order to reach the fee cap levels. The proposed change could also increase competition between the Exchange and other option markets by making the Exchange a more desirable market with respect to pricing for FLEX Option transactions and strategy executions.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[12] of the Act and subparagraph (f)(2) of Rule 19b–4[13] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[14] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2013–98 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2013–98. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room at 100 F Street NE., Washington, DC 20549–1090 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2013–98, and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–29614 Filed 12–11–13; 8:45 am]

BILLING CODE 8011–01–P

[10] *See supra* note 7.

[11] 15 U.S.C. 78f(b)(8).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(2).

[14] 15 U.S.C. 78s(b)(2)(B).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71025; File No. SR–BOX–2013–55]

Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule to Permit the Exchange to Exclude from Its Average Daily Volume Calculations Any Trading Day on Which the Exchange Is Closed for Trading Due To an Early Closing Or a Market-Wide Trading Halt

December 6, 2013.

Pursuant to Section 19(b)(1) under the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 27, 2013, BOX Options Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend the Fee Schedule for trading on the BOX Market LLC (''BOX'') options facility the Fee Schedule to permit the Exchange to adjust the average daily volume calculation for any trading day on which the Exchange is closed for trading due to an early closing or a market-wide trading halt. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://boxexchange.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule for trading on BOX to permit the Exchange to adjust the average daily volume (''ADV'') calculation for any trading day on which the Exchange is closed for trading due to an early closing or a market-wide trading halt.

In Section I (Exchange Fees) of the BOX Fee Schedule, the Exchange provides volume-based incentives for certain transaction fees. In Section I.A the Exchange provides a volume-based incentive to Initiating Participants that submit Primary Improvement Orders, Facilitation Orders, or Solicitation Orders and, on a daily basis, trade a monthly ADV of more than 5,000 contracts in Auction Transactions on BOX. Similarly, in Section I.B. the Exchange provides a volume-based incentive on all standard transaction fees to Market Makers that, on a daily basis, trade a monthly ADV of more than 5,000 contracts on BOX. In both Sections the Participant's monthly ADV is calculated at the end of each month.

The Exchange is proposing to amend the BOX Fee Schedule to permit the Exchange to adjust the ADV calculation for any trading day where the market is not open for the entire trading day. Specifically, in these situations the Exchange could count any day when the market closes early due to a holiday observance as a half day in the calculation, or exclude from the calculation any day where the Exchange declares a trading halt in all securities or honors a market-wide trading halt declared by another market. For example, this would have allowed the Exchange to exclude August 22, 2013 when trading was halted in Nasdaq-listed securities for three hours across all exchanges. The Exchange is not proposing any changes to the monthly ADV thresholds required to achieve each volume tier and will issue an information circular to inform Participants of any trading day where the monthly ADV calculations will be adjusted in connection with this proposed rule change.

The Exchange believes it is appropriate to adjust the calculation of monthly ADV for these days because a Participant will have artificially low trading volume if the market is not open for the entire trading day. In the corresponding monthly ADV calculation, the numerator for the calculation (trading volume) will decrease, while the denominator (the number of trading days) will remain the same and not reflect the irregularity that caused the decrease. This would result in a lower monthly ADV for the Participant and could mean that the Participant is not eligible for a higher volume tier, and corresponding lower fee. Accordingly, giving the Exchange the ability to exclude these days from the monthly ADV calculation will ensure this scenario no longer occurs.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act, in general, and Section 6(b)(4) and 6(b)(5) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among BOX Participants and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that it is equitable and reasonable to adjust the monthly ADV calculations for any trading day on which the Exchange is closed for trading due to an early closing or a market-wide trading halt because it preserves the Exchange's intent behind adopting volume based fees. The proposed change is non-discriminatory because it applies equally to all Participants and to all volume tiers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. With respect to monthly ADV calculations, the Exchange notes that there are very few instances where this change will actually be invoked, and when invoked, the Exchange believes the rule will have little or no impact on trading decisions or execution quality. To the contrary, the Exchange believes that the proposed modification to its ADV calculation is pro-competitive and will result in lower total costs to Participants, a positive

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] 15 U.S.C. 78f(b)(4) and (5).

outcome of competitive markets. Moreover, other options exchanges have adopted rules that are similar to the change in ADV calculation being proposed by the Exchange.[6]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act[7] and Rule 19b–4(f)(2) thereunder,[8] because it establishes or changes a due or fee.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–BOX–2013–55 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BOX–2013–55. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BOX–2013–55 and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–29624 Filed 12–11–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71011; File No. SR–BX–2013–057]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Proposed Rule Change To Amend the Restated Certificate of Incorporation and By-Laws of the NASDAQ OMX Group, Inc.

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 27, 2013, NASDAQ OMX BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing this proposed rule change with respect to amendments of the Restated Certificate of Incorporation (the ''Charter'') and By-Laws (the ''By-Laws'') of its parent corporation, The NASDAQ OMX Group, Inc. (''NASDAQ OMX'' or the ''Company''). The proposed amendments will be implemented on a date designated by NASDAQ OMX following approval by the Commission. The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxbx.cchwallstreet.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ OMX is proposing to make certain amendments to its Charter and By-Laws.

(i) Background

At NASDAQ OMX's 2012 annual meeting held on May 22, 2012, NASDAQ OMX's stockholders considered two proposals submitted by individual stockholders. The first proposal, which passed with 68% of the votes cast, requested that NASDAQ OMX's Board take steps to replace each supermajority voting standard in the

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[6] *See* Securities Exchange Act Release Nos. 70472 (September 23, 2013), 78 FR 59738 (September 27, 2013)(Notice of Filing and Immediate Effectiveness of SR–PHLX–2013–93); 70470 (September 23, 2013) 78 FR 59740 (September 27, 2013)(Notice of Filing and Immediate Effectiveness of SR–NASDAQ–2013–117); and 70657 (October 10, 2013), 78 FR 62899 (October 22, 2013)(Notice of Filing and Immediate Effectiveness of SR–ISE–2013–51).

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Charter and By-Laws [3] with a voting standard requiring a ''majority of votes cast.'' The second proposal, which did not pass but received 49% of the votes cast, requested that NASDAQ OMX's Board take steps to enable stockholders having at least one-tenth of NASDAQ OMX's voting power to call a special meeting of stockholders.

Following the 2012 annual meeting, the Nominating & Governance Committee of NASDAQ OMX's Board reviewed the voting results on the two stockholder proposals and discussed the stockholder voting standards and rights contemplated by the Charter and By-Laws. Following this review, the Nominating & Governance Committee recommended to the Board, and the Board approved, certain changes to the Charter and By-Laws to address the two stockholder proposals and make other changes. NASDAQ OMX now proposes to make these changes, which are described further below.

(ii) Proposed Amendments to Charter

(a) Removal and Replacement of Supermajority Voting Requirements

To respond to feedback from its stockholders, NASDAQ OMX proposes to replace each supermajority voting requirement in the Charter with a ''majority of outstanding shares'' voting requirement. The Charter currently includes the following three supermajority voting requirements.

- *Removal of Directors.* Article Fifth, Paragraph D provides that, except for directors elected by the holders of any series of preferred stock, any director, or the entire Board, may be removed from office at any time, but only by the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors (the ''Voting Stock''), voting together as a single class.
- *Adoption, Alteration, Amendment and Repeal of By-Laws.* Article Eighth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the total voting power of the outstanding Voting Stock, voting together as a single class, shall be required in order for the stockholders to adopt, alter, amend or repeal any By-Law.
- *Adoption, Alteration, Amendment and Repeal of Certain Charter Provisions.* Article Ninth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the voting power of the outstanding Voting Stock, voting together as a single class, shall be required to amend, repeal or adopt any provision inconsistent with paragraph C of Article Fourth,[4] Article Fifth,[5] Article Seventh,[6] Article Eighth [7] or Article Ninth of the Charter.[8]

In each of the three provisions described above, NASDAQ OMX proposes to remove the requirement for an affirmative vote of at least 66 ⅔% of the total voting power of the Voting Stock and replace it with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock. In developing this proposal, NASDAQ OMX considered the relative weight of the arguments for and against supermajority voting requirements. Historically, supermajority voting requirements have protected corporations against coercive takeover tactics by requiring broad stockholder support for certain types of transactions or governance changes. However, in recent years, corporate governance standards have evolved, and many stockholder rights advocates argue that supermajority voting requirements limit stockholders' participation in corporate governance. NASDAQ OMX believes that while it is important to protect against coercive takeover tactics, it is also critically important to obtain stockholder input and respond to stockholder concerns about corporate governance.

NASDAQ OMX believes that the proposed ''majority of outstanding shares'' voting requirement will continue to provide some protection against proposals that are harmful to the stockholders. While this requirement is less difficult to satisfy than a supermajority voting requirement, it is more difficult to satisfy than a ''majority of votes cast'' requirement, which NASDAQ OMX considered as an alternate option. NASDAQ OMX believes that a ''majority of outstanding shares'' standard is a balanced outcome that responds to stockholder feedback while appropriately maintaining NASDAQ OMX's defensive posture against hostile takeovers.

(b) Non-Substantive Changes

NASDAQ OMX also proposes to amend and restate the Charter to make other non-substantive changes. Specifically, the proposal deletes obsolete references to the following:

- The 3.75% Series A Convertible Notes due 2012 and the 3.75% Series B Convertible Notes due 2012, which are no longer outstanding, in Article Fourth, Paragraph C and Article Eleventh;
- a voting trust agreement, which is no longer in effect, in Article Fourth, Paragraph C(3)(b)(iii);
- ownership of NASDAQ OMX securities by the National Association of Securities Dealers, Inc., certain affiliates of Hellman & Friedman LLC, and certain affiliates of Silver Lake, none of which currently own any NASDAQ OMX securities, in Article Fourth, Paragraph C(6); [9] and

[3] These provisions, which are described further below, require the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock to approve certain actions.

[4] Paragraph C of Article Fourth sets forth the 5% voting limitation, which provides that holders of NASDAQ OMX's voting securities may not cast votes in excess of 5% of NASDAQ OMX's outstanding voting securities. To be clear, NASDAQ OMX is not proposing any change to the 5% voting limitation itself. NASDAQ OMX only proposes that any future amendment of the 5% voting limitation will require the approval of stockholders holding a majority of the outstanding shares, rather than stockholders holding 66⅔% of the outstanding shares.

[5] Article Fifth includes certain provisions relating to the Board, such as Board size and director elections.

[6] Article Seventh prohibits stockholder action by written consent.

[7] Article Eighth establishes the procedures to adopt, alter, amend or repeal the By-Laws.

[8] Article Ninth establishes the procedures to adopt, alter, amend or repeal the Charter.

[9] NASDAQ OMX notes that the remaining text of Article Fourth, Paragraph C(6) of the Charter includes an obsolete cross-reference to Section 6(b) of Article Fourth, Paragraph C in the second sentence, which begins ''The Board, however, may not approve an exemption under Section 6(b). . . .'' NASDAQ OMX cannot correct this cross-reference, which should refer to Section 6 without further reference to a subsection (b), without seeking further approval of its stockholders, which would require NASDAQ OMX to call and hold a stockholder meeting. Generally, NASDAQ OMX holds stockholder meetings, which are time consuming and expensive, only once or twice a year. Moreover, it is atypical of a large public company like NASDAQ OMX to submit a proposal to its stockholders solely to correct a cross-reference in its Charter. However, NASDAQ OMX believes, following consultation with outside counsel, that it is clear, based on the drafting history of this provision, that the intent of the cross-reference is to refer to Section 6 of Article Fourth, Paragraph C of the Charter. In other words, the second sentence of Article Fourth, Paragraph C(6) should read: ''The Board, however, may not approve an exemption under Section 6: (i) for a registered broker or dealer or an Affiliate thereof or (ii) an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act.'' Under no circumstances will NASDAQ OMX read the obsolete cross-reference to imply that the Board could grant an exemption to the ownership limitation in Article Fourth, Paragraph C(6) of the Charter for a registered broker or dealer or an Affiliate thereof, or an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act. NASDAQ OMX also notes that it is proposing amendments to Section 12.5 of the By-Laws to eliminate cross-references to subsection (b) of Article Fourth, Paragraph C(6) of the Charter. Finally, NASDAQ OMX notes that there are some differences in language between the second sentence of Article Fourth, Paragraph C(6) of the Charter and the second sentence of Section 12.5 of the By-Laws. To the extent that these differences would cause a difference in interpretation, NASDAQ OMX notes, following consultation with outside counsel, that the Charter

• the phase-out of the classified board structure, which was complete in 2007, in Article Fifth, Paragraph B.

In Article Fifth, Paragraph B, the proposal also clarifies that the election of directors by stockholders shall occur at an annual or special meeting. The proposal corrects a typographical error in Article Fifth, Paragraph A and renumbers the provisions of the Charter, where necessary following the other amendments. Finally, the proposal amends the introductory and concluding language of the Charter to incorporate language that will be required under Delaware law when the amended and restated Charter is filed with the Secretary of State of the State of Delaware.[10]

The amendment and restatement of the Charter to incorporate these non-substantive changes will simplify and streamline the document.

(iii) Proposed Elimination of Certificate of Designation

NASDAQ OMX proposes to eliminate its Certificate of Designation, Preferences and Rights of Series A Convertible Preferred Stock (the ''Series A Convertible Preferred Stock''), and all matters set forth therein. The Series A Convertible Preferred Stock was created in 2009 to facilitate the conversion of certain notes into common stock.[11] The Company authorized 2 million shares of the Series A Convertible Preferred Stock and immediately issued 1.6 million of those shares to the converting noteholders.

In 2010, following stockholder approval, all 1.6 million issued shares of the Series A Convertible Preferred Stock were converted into common stock. Since then, no shares of the Series A Convertible Preferred Stock have been outstanding, and the Company has no intention to issue further shares of this series.

As a clean-up matter, the Company seeks to file a certificate of elimination with the Secretary of State of the State of Delaware to eliminate the Series A Convertible Preferred Stock. Under Delaware law, a certificate of elimination is deemed to be an amendment to NASDAQ OMX's Charter; however, since the amendment is limited in scope, it does not require the approval of NASDAQ OMX's stockholders.[12]

(iv) Proposed Amendments to the By-Laws

(a) Special Meetings of Stockholders

Current Section 3.2 of NASDAQ OMX's By-Laws provides that only NASDAQ OMX may call special meetings of its stockholders.[13] To respond to feedback from its stockholders, as discussed above, NASDAQ OMX proposes to delete this provision and replace it with language that will allow NASDAQ OMX's stockholders to call special meetings after following particular procedures. Similar to the elimination of supermajority voting requirements, which is discussed above, the implementation of the right of stockholders to call a special meeting has received recent attention from investor and corporate governance advocates. These advocates argue that such a right will enable stockholders to raise and act on matters that arise between annual meetings.

Following discussions with some of its stockholders, NASDAQ OMX agrees that it is appropriate to allow stockholders who meet certain procedural requirements to call a special meeting. In proposing these procedural requirements, NASDAQ OMX's goals are to ensure timely notice of a meeting request and to gather sufficient information about the proposing stockholder(s) and the proposal. Among other things, this information will ensure that NASDAQ OMX is able to comply with its disclosure and other requirements under applicable law and that NASDAQ OMX, its Board and its stockholders are able to assess the proposal adequately. The proposed procedural requirements are set forth below.

First, proposed Section 3.2(a) provides that special meetings of NASDAQ OMX's stockholders may only be called: (i) at any time by NASDAQ OMX's Board pursuant to a resolution adopted by a majority of the total number of directors NASDAQ OMX would have if there were no vacancies; and (ii) by NASDAQ OMX's Corporate Secretary following the receipt of a written request in proper form for a special meeting (a ''Special Meeting Request'') by one or more stockholders. Such stockholders (the ''Requisite Holders'') must hold of record, in the aggregate, at least 15 percent of NASDAQ OMX's outstanding shares of capital stock entitled to vote on matters to be brought before the special meeting (the ''Requisite Percentage''). Such shares must be ''Net Long Shares,''[14] and the Requisite Holders must have held the shares continuously for at least one year as of the date of the Special Meeting Request. Whether shares constitute Net Long Shares shall ultimately be decided by NASDAQ OMX's Board in its reasonable determination. The intent of the requirement for stockholders to maintain a ''net long position'' is to limit the ability to call a special meeting to stockholders that have long-term record and economic positions in NASDAQ OMX.

Proposed Section 3.2(a) also sets forth the procedures for determining whether a special meeting has been requested by Requisite Holders representing in aggregate at least the Requisite Percentage if multiple Special Meeting Requests are delivered to NASDAQ OMX's Corporate Secretary. Multiple requests will be considered together only if: (i) each Special Meeting Request identifies substantially the same purpose or purposes of the special

language shall prevail. As soon as feasible, NASDAQ OMX plans to present a proposal to the stockholders to conform this provision of the Charter to the By-Laws.

[10] *See* Sections 242 and 245 of the DGCL.

[11] *See* Securities Exchange Act Release No. 60845 (October 20, 2009), 74 FR 55078 (October 26, 2009) (SR–BX–2009–061, SR–NASDAQ–2009–087, SR–Phlx–2009–88); *see also* Securities Exchange Act Release No. 61000 (November 13, 2009), 74 FR 61390 (November 24, 2009) (SR–BSECC–2009–005); *see also* Securities Exchange Act Release No. 61001 (November 13, 2009), 74 FR 61391 (November 24, 2009) (SR–SCCP–2009–04).

[12] *See* Section 151(g) of the DGCL.

[13] Under Delaware law, special meetings of a corporation's stockholders may be called by the board of directors or by such persons as may be authorized by the certificate of incorporation or the bylaws. *See* Section 211(d) of the DGCL.

[14] For purposes of determining Requisite Holders under proposed Section 3.2, ''Net Long Shares'' shall be limited to the number of shares beneficially owned, directly or indirectly, by any stockholder or beneficial owner that constitute such person's ''net long position'' as defined in Rule 14e–4 under the Act, provided that (A) for the purposes of this definition, references in the rule to ''the date the tender offer is first publicly announced or otherwise made known by the bidder to the holders of the security to be acquired'' shall be the date of the relevant Special Meeting Request and all dates in the one year period prior thereto, the ''highest tender offer price or stated amount of the consideration offered for the subject security'' shall refer to the closing sales price of NASDAQ OMX's capital stock on NASDAQ on such date (or, if such date is not a trading day, the next succeeding trading day), the ''person whose securities are the subject of the offer'' shall refer to NASDAQ OMX, a ''subject security'' shall refer to the issued and outstanding voting stock of NASDAQ OMX; and (B) the net long position of such stockholder shall be reduced by any shares as to which such person does not have the right to vote or direct the vote at the proposed special meeting or as to which such person has entered into a derivative or other agreement, arrangement or understanding that hedges or transfers, in whole or in part, directly or indirectly, any of the economic consequences of ownership of such shares. In addition, to the extent any affiliates of the stockholder or beneficial owner are acting in concert with the stockholder or beneficial owner with respect to the calling of the special meeting, the determination of Net Long Shares may include the effect of aggregating the Net Long Shares (including any negative number) of such affiliate or affiliates. *See* proposed Section 3.2(a) of the By-Laws.

meeting and substantially the same matters proposed to be acted on at the requested special meeting (in each case as determined in good faith by NASDAQ OMX's Board); and (ii) such Special Meeting Requests have been dated and delivered to NASDAQ OMX's Corporate Secretary within 60 days of the earliest dated Special Meeting Request. NASDAQ OMX believes these procedures are reasonable and clear and notes that they grant only limited discretion to NASDAQ OMX's Board in determining whether Special Meeting Requests will be considered together.

Pursuant to proposed Section 3.2(b), if a Special Meeting Request is in proper form, NASDAQ OMX's Board shall determine the place, if any, date and time of the special meeting, and NASDAQ OMX's Corporate Secretary shall call the special meeting within 120 days after the date the Special Meeting Request was delivered. However, NASDAQ OMX's Board may, in lieu of calling a special meeting, present an identical or substantially similar item of business (a ''Similar Item''),[15] as determined in good faith by NASDAQ OMX's Board, for stockholder approval at any other meeting of the stockholders that is held not less than 120 days after the delivery of the Special Meeting Request. The intent of this provision is to save NASDAQ OMX the time and expense of calling and holding a special meeting if NASDAQ OMX intends to hold a separate stockholders' meeting within 120 days. In fixing the place, if any, date and time for any special meeting, NASDAQ OMX's Board may consider such factors as it deems relevant in its business judgment, including the nature of the matters to be considered, the facts and circumstances surrounding any request for a meeting and any plan of the Board to call an annual meeting or a special meeting.

Proposed Section 3.2(c) sets forth certain limitations on Special Meeting Requests. Specifically, a Special Meeting Request will not be valid if:

- it relates to an item of business that is not a proper subject for stockholder action under applicable law;
- it is delivered during the period commencing 90 days prior to the one-year anniversary of the date of the immediately preceding annual meeting and ending on the date of the next annual meeting;
- a Similar Item was presented at any meeting of stockholders held within 120 days prior to the date on which the Special Meeting Request was delivered; or
- a Similar Item is included in NASDAQ OMX's notice of meeting as an item of business to be presented at a stockholder's meeting that has been called but not yet held.

The Board may adjourn or reschedule any previously scheduled special meeting of the stockholders. NASDAQ OMX believes the subject matter limitations set forth in proposed Section 3.2(c) are appropriate in order to comply with applicable law and to prevent multiple considerations of the same item of business. NASDAQ OMX believes the time limits set forth in proposed Section 3.2(c) are appropriate to ensure that NASDAQ OMX is not required to incur the time and expense of calling and holding a special meeting of stockholders immediately prior to an upcoming annual meeting of stockholders or if a Similar Item of business already has been presented at a recent stockholders' meeting.

To be in proper form, a Special Meeting Request must comply with certain requirements, as described further below.[16] NASDAQ OMX's Board will have the sole discretion to determine whether a Special Meeting Request is in proper form.[17] Proposed Section 3.2(d) sets forth the requirements for a Special Meeting Request to be in proper form. These proposed requirements will ensure that NASDAQ OMX has sufficient information to comply with its disclosure requirements under applicable law and that the Requisite Holders maintain a sufficient ownership level through the date of the special meeting. Specifically, a Special Meeting Request shall:

- be in writing, signed by each Requesting Person[18] and delivered to NASDAQ OMX's Corporate Secretary at NASDAQ OMX's principal executive offices;
- set forth certain information with respect to (i) each person the Requesting Person proposes to nominate for director, (ii) any business the Requesting Person proposes to bring before the meeting and (iii) each Requesting Person [19]; and
- include (i) an agreement by each Requisite Holder to immediately deliver written notice to NASDAQ OMX's Corporate Secretary in the case of any disposition, on or prior to the record date for the special meeting, of any shares of NASDAQ OMX's capital stock held of record by such Requisite Holder and (ii) an acknowledgement that (1) any such disposition shall be deemed a revocation of the Special Meeting Request to the extent of such disposition and (2) if, following such deemed revocation, the Requisite Holders hold of record, in the aggregate, less than the Requisite Percentage of the voting power of all outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors, NASDAQ OMX shall have no obligation to hold the special meeting.

Proposed Section 3.2(f) provides that at any special meeting of the stockholders, the only business to be conducted or considered will have been specified in the notice of meeting (or any supplement thereto) given by or at the direction of NASDAQ OMX's Board or Corporate Secretary, as the case may be. In any event, however, NASDAQ OMX's Board may submit its own proposal or proposals for consideration at a special meeting. Except as otherwise allowed under proposed Section 3.2, stockholders will not be permitted to propose business to be brought before a special meeting of the stockholders. NASDAQ OMX believes these provisions are reasonable and necessary to limit the items of business that may be considered at a special meeting to those that were proposed by the Company, the Board or stockholders that comply with the requirements and procedures set forth in the By-Laws.

Proposed Section 3.2(g) will require the Requisite Holders giving a Special Meeting Request to further update and supplement the request, if necessary, so that the information in the request is true and correct as of the record date for the special meeting and as of the 10th business day prior to the special meeting or any adjournment or postponement thereof. This requirement will ensure that NASDAQ OMX, its Board and its other stockholders are notified of changes to the information they will consider in assessing a proposed item of business prior to the special meeting. In the case of an update and supplement required to be made as of the record date, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the fifth business day after the

[15] Under proposed Section 3.2(b) of the By-Laws, the election of directors shall be deemed a ''Similar Item'' with respect to all items of business involving the nomination, election or removal of directors.

[16] *See* proposed Section 3.2(a) of the By-Laws.

[17] *Id.*

[18] ''Requesting Person'' means (i) each Requisite Holder, (ii) the beneficial owner or beneficial owners, if different, on whose behalf the Special Meeting Request is being delivered to NASDAQ OMX's Corporate Secretary and (iii) any affiliate or associate of such stockholder or beneficial owner. *See* proposed Section 3.2(e) of the By-Laws.

[19] The information required is the same information required from Proposing Persons with respect to nominations or items of business to be brought before an annual meeting of stockholders and is described in detail in Section (iv)(b) below.

record date for the special meeting. In the case of an update and supplement required to be made as of the 10th business day prior to the special meeting or any adjournment or postponement thereof, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the eighth business day prior to the date for the special meeting or, if practical, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the special meeting has been adjourned or postponed).

Proposed Section 3.2(h) will allow the Requisite Holders to revoke a Special Meeting Request by written revocation delivered to NASDAQ OMX at any time prior to the special meeting requested. However, NASDAQ OMX's Board will have the discretion to determine whether or not to proceed with the special meeting. The Board might wish to continue with the special meeting if, for example, the Company has already spent the time and expense required to call the meeting or if the agenda for the meeting includes items other than those proposed in the Special Meeting Request.

Finally, NASDAQ OMX proposes to designate as Section 3.2(i) existing text that sets forth the requirements for stockholders to submit nominees for election as directors at certain stockholder meetings. NASDAQ OMX further proposes to make a minor change to this text to clarify that NASDAQ OMX's Board, rather than the Company itself, will call a special meeting on behalf of the Company.

(b) Annual Meetings of Stockholders

Section 3.1 of NASDAQ OMX's By-Laws, which is the ''advance notice'' provision,[20] requires stockholders to notify NASDAQ OMX, during a specified period in advance of an annual meeting, of their intention to nominate one or more persons for election to the Board or to present a business proposal for consideration by the stockholders at the meeting. While designing the proposed procedural requirements for stockholders to call a special meeting, as outlined above, NASDAQ OMX evaluated the existing procedural requirements for stockholders to bring business before an annual meeting. NASDAQ OMX is therefore proposing changes to some of these procedures to enhance them and conform them, in some cases, to the procedures relating to special meetings. Generally, the proposed amendments add requirements for extensive disclosures by proposing stockholders about themselves, any proposed nominees for director and any proposed items of business to be brought before a meeting. The specific amendments are discussed in detail below.

First, Section 3.1(a) of the By-Laws currently states that nominations of persons for election to NASDAQ OMX's Board and the proposal of other business to be considered by the stockholders at an annual meeting of stockholders may be made only: (i) Pursuant to the Company's notice of meeting (or any supplement thereto); (ii) by or at the direction of NASDAQ OMX's Board or its Nominating & Governance Committee; or (iii) by any stockholder of the Company that meets certain requirements. These requirements state that the stockholder must: (i) Be a stockholder of record at the time of delivery of notice to the Company of nominees or other business to be conducted at the meeting; (ii) be entitled to vote at the meeting; and (iii) comply with the notice procedures set forth in the By-Laws. NASDAQ OMX proposes to add a parenthetical to the requirement that a stockholder must be a stockholder of record to clarify that a nomination or proposal of other business may be made on behalf of a beneficial owner, if different from the stockholder of record, only if the beneficial owner is the beneficial owner of NASDAQ OMX shares. This modification will clarify that both record and beneficial owners of NASDAQ OMX stock have the right to propose nominees or business to be considered at an annual meeting. NASDAQ OMX further proposes that a stockholder who proposes nominees or business to be considered at an annual meeting must hold shares in the Company at the time of the meeting, in addition to the time of delivery of the required notice to the Company. This will ensure that a stockholder retains an interest in the Company until the meeting at which the stockholder's nominee or other business is considered. Finally, NASDAQ OMX proposes to number the procedural requirements for stockholders who propose nominees or business to make them easier to understand.

Currently, Section 3.1(b) of the By-Laws sets forth the requirements for a stockholder's notice to NASDAQ OMX of nominations or other business to be considered at an annual meeting. NASDAQ OMX proposes certain amendments to this section to ensure that NASDAQ OMX has sufficient information about such nominations or other business proposed by a stockholder to enable the Company, the Board and the other stockholders to assess a position on the nominations or other business. The additional information requirements will also ensure that NASDAQ OMX can make adequate disclosures to its stockholders and comply with requirements under applicable law.

Specifically, NASDAQ OMX proposes an amendment to the first paragraph of this section to require a stockholder who provides a notice relating to a nomination to include with the notice, a completed and signed questionnaire, representation and agreement relating to the nominee(s) for director.[21] NASDAQ OMX also proposes to require a stockholder who provides a notice to further update and supplement the notice, if necessary, so that the information in the notice is true and correct as of the record date for the annual meeting and as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof.[22] This requirement will ensure that NASDAQ OMX, its Board and its other stockholders are notified of changes to the information they will consider in assessing a proposed item of business prior to the annual meeting. In the case of an update and supplement required to be made as of the record date, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the fifth business day after the record date for the annual meeting. In the case of an update and supplement required to be made as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the eighth business day prior to the date for the annual meeting or, if practicable, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the annual

[20] ''Advance notice'' provisions allow stockholder(s) to bring business before an annual meeting of stockholders, but set forth procedural requirements to ensure that companies and boards have sufficient information about the proposal and the proposing stockholder(s), as well as adequate time to consider the proposal, by requiring the proposing stockholder(s) to give advance notice of the intention to bring the proposal before the annual meeting.

[21] The contents of and rationale for the questionnaire, representation and agreement are discussed further in Section (iv)(c) below.

[22] NASDAQ OMX notes that this proposal is similar to proposed Section 3.2(g) of the By-Laws, which requires updates and supplements to a stockholder notice relating to a special meeting. This proposed change is discussed further in Section (iv)(a) above.

meeting has been adjourned or postponed).

Section 3.1(b)(i) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ OMX about each person whom the stockholder proposes to nominate for election as a director. NASDAQ OMX proposes changes to this section to use the defined term ''Proposing Person'' instead of stockholder,[23] to require information with respect to nominees for reelection as well as nominees for election, to correct a reference to the Act and to add numbering and other organizational changes to make the requirements easier to read and understand. NASDAQ OMX also proposes to require the same information with respect to a proposed nominee that will be required with respect to a Proposing Person, as discussed further below. In addition, NASDAQ OMX proposes to add two new informational requirements for proposed nominees, including:

- a description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships, between or among any Proposing Person, on the one hand, and such proposed nominee and any of his or her respective affiliates and associates, on the other hand, including, without limitation, all information that would be required to be disclosed pursuant to Item 404 under Regulation S–K if such Requesting Person were the ''registrant'' for purposes of such rule and the proposed nominee were a director or executive officer of such registrant; and
- a completed and signed questionnaire, representation and agreement.[24]

Finally, NASDAQ OMX proposes to add a catch-all provision to Section 3.1(b)(i) of the By-Laws that will allow the Company to require any proposed nominee to furnish such other information (i) as the Company may reasonably require to determine the eligibility of such proposed nominee to serve as a director or (ii) that could be material to a reasonable stockholder's understanding of the independence, or lack of independence, of such proposed nominee. NASDAQ OMX believes that all of the new information requirements included in proposed Section 3.1(b)(i) are reasonable and necessary in order to assist the Company in evaluating director eligibility, independence and potential conflicts of interest.

Section 3.1(b)(ii) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ OMX about any business, other than nominations for director, that the stockholder proposes to bring before an annual meeting. NASDAQ OMX proposes changes to this section to require that the description of the proposed business be reasonably detailed, to use the defined term ''Proposing Person'' instead of stockholder and beneficial owner in certain places and to add numbering, reordering and other organizational changes to make the requirements easier to read and understand. NASDAQ OMX also proposes to add a new requirement for a stockholder to provide a reasonably detailed description of all contracts, agreements, arrangements and understandings between or among any of the Proposing Persons or between or among any Proposing Person in connection with the proposal. NASDAQ OMX believes this information will be useful in assessing the aims and incentives of Proposing Persons in proposing business before an annual meeting.

Section 3.1(b)(iii) of the By-Laws currently sets forth the information that a stockholder who proposes nominee(s) for director or other business to be put forth before an annual meeting must provide to NASDAQ OMX about such stockholder and the beneficial owner, if any, on whose behalf the nomination or proposal is made. NASDAQ OMX proposes changes to this section to use the defined term ''Proposing Person'' instead of stockholder and beneficial owner in certain places and to add numbering, reordering and other organizational changes to make the requirements easier to read and understand.

Relating to the existing requirement in Section 3.1(b)(iii)(B) that a proposing stockholder describe the class or series and number of shares of NASDAQ OMX capital stock owned beneficially and of record by such stockholder and the beneficial owner, NASDAQ OMX proposes to add a parenthetical stating that beneficial ownership shall be determined within the meaning of Rule 13d–3 under the Act. NASDAQ OMX also proposes to state that a Proposing Person shall in all events be deemed to beneficially own any shares of any class or series of NASDAQ OMX's capital stock as to which such person has a right to acquire beneficial ownership at any time in the future. These proposed changes merely clarify how the concept of beneficial ownership will be interpreted under this section of the By-Laws.

Current Section 3.1(b)(iii)(D) requires proposing stockholders to describe to NASDAQ OMX any agreement, arrangement or understanding (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares) that has been entered into as of the date of the notice by the stockholder and the beneficial owners with respect to NASDAQ OMX's stock. Given the increased complexity of such transactions in today's marketplace, NASDAQ OMX proposes to replace the current language with a similar requirement for disclosure of any Synthetic Equity Interest,[25] without regard to whether: (i) The derivative, swap or other transaction or series of transactions conveys any voting rights in such shares to the Proposing Person; (ii) the derivative, swap or other transaction or series of transactions is required to be, or is capable of being, settled through delivery of such shares; or (iii) the Proposing Person may have entered into other transactions that hedge or mitigate the economic effect of such derivative, swap or other transaction or series of transactions. This proposed provision will assist NASDAQ OMX, its Board and its other stockholders in understanding a Proposing Person's full economic interests in NASDAQ OMX and possible aims and incentives in submitting the proposed business for consideration at an annual meeting.

[23] ''Proposing Person'' means (i) the stockholder providing the notice of business or the notice of the nomination, as applicable, proposed to be brought before an annual meeting, (ii) any beneficial owner or beneficial owners, if different, on whose behalf such business is proposed to be brought before the meeting or the notice of the nomination proposed to be made at the meeting is made, as applicable, and (iii) any affiliate or associate (each within the meaning of Rule 12b–2 under the Act for purposes of the By-Laws) of such stockholder or beneficial owner. *See* proposed Section 3.1(c) of the By-Laws.

[24] The contents of and rationale for the questionnaire, representation and agreement are discussed further in Section (iv)(c) below.

[25] ''Synthetic Equity Interest'' shall mean any derivative, swap or other transaction (including any short positions, profit interest, options, warrants, convertible securities, stock appreciation or similar rights) or series of transactions engaged in, directly or indirectly, by a Proposing Person, the purpose or effect of which is to give the Proposing Person economic risk similar to ownership of shares of any class or series of NASDAQ OMX, including due to the fact that the value of such derivative, swap or other transaction or series of transactions is determined by reference to the price, value or volatility of any shares of any class or series of NASDAQ OMX, or which derivative, swap or other transaction or series of transactions provides, directly or indirectly, the opportunity to profit from any increase in the price or value of shares of any class or series of NASDAQ OMX. *See* proposed Section 3.1(b)(iii)(D) of the By-Laws.

For this same reason, NASDAQ OMX also proposes to add several new disclosures that a Proposing Person must include in a notice to NASDAQ OMX regarding nominees or other business to be conducted at an annual meeting. These include disclosures regarding:

• Any proxy (other than a revocable proxy or consent given in response to a solicitation made pursuant to, and in accordance with, Section 14(a) of the Act by way of a solicitation statement filed on Schedule 14A), agreement, arrangement, understanding or relationship pursuant to which the Proposing Person has or shares a right to vote any shares of any class or series of NASDAQ OMX; [26]

• any proportionate interest in NASDAQ OMX shares or Synthetic Equity Interest held, directly or indirectly, by a general or limited partnership in which the Proposing Person is a general partner or, directly or indirectly, beneficially owns an interest in a general partner; [27]

• any agreement, arrangement, understanding or relationship, including any repurchase or similar so-called ''stock borrowing'' agreement or arrangement, entered into or engaged in, directly or indirectly, by the Proposing Person, the purpose or effect of which is to mitigate loss to, reduce the economic risk (of ownership or otherwise) of shares of any class or series of NASDAQ OMX by, manage the risk of share price changes for, or increase or decrease the voting power of, the Proposing Person with respect to shares of any class or series of NASDAQ OMX, or that provides, directly or indirectly, the opportunity to profit from any decrease in the price or value of shares of any class or series of NASDAQ OMX (any of the foregoing, a ''Short Interest''); [28]

• any performance-related fees (other than an asset-based fee) to which the Proposing Person is entitled based on any increase or decrease in the price or value of shares of any class or series of NASDAQ OMX, or any Synthetic Equity Interest or Short Interest; [29]

• any significant equity interest or any Synthetic Equity Interest or Short Interest in any principal competitor of NASDAQ OMX held by the Proposing Person; [30]

• any direct or indirect interest of the Proposing Person in any contract with NASDAQ OMX, any affiliate of NASDAQ OMX or any principal competitor of NASDAQ OMX (including, in any such case, any employment agreement, collective bargaining agreement or consulting agreement); [31]

• any pending or threatened litigation in which the Proposing Person is a party or material participant involving NASDAQ OMX or any of its officers or directors, or any affiliate of NASDAQ OMX; [32]

• any material transaction occurring, in whole or in part, during the then immediately preceding 12-month period between such Proposing Person, on the one hand, and NASDAQ OMX, any affiliate of NASDAQ OMX or any principal competitor of NASDAQ OMX, on the other hand; [33] and

• any other information relating to the Proposing Person required to be disclosed in a proxy statement or other filings required to be made in connection with solicitations of proxies for, as applicable, the proposal and/or for the election of directors in an election contest pursuant to and in accordance with Section 14(a) of the Act and the rules and regulations promulgated thereunder.[34]

(c) Questionnaire, Representation and Agreement for Director-Nominees

NASDAQ OMX proposes to add a new Section 3.5 to its By-Laws to require nominees for director to deliver to NASDAQ OMX, in accordance with the time periods prescribed for delivery of a stockholder's notice: (i) a written questionnaire with respect to the background and qualifications of the nominee; and (ii) a written representation and agreement as to certain matters. Specifically, the written representation and agreement will provide that the nominee:

• Is not and will not become a party to (i) any agreement as to how the nominee will act or vote on any issue or question (a ''Voting Commitment'') that has not been fully disclosed to NASDAQ OMX or (ii) any Voting Commitment that could limit or interfere with the nominee's fiduciary duties under applicable law;

• is not and will not become a party to any agreement with any person other than NASDAQ OMX with respect to any direct or indirect compensation, reimbursement or indemnification in connection with service or action as a director of NASDAQ OMX that has not been fully disclosed to NASDAQ OMX;

• would be in compliance, if elected, and will comply, with the provisions of NASDAQ OMX's By-Laws relating to qualifications of directors, conflicts of interest and contracts and transactions involving directors; and

• in such proposed nominee's individual capacity and on behalf of any person on whose behalf the nomination is made, would be in compliance, if elected, and will comply, with NASDAQ OMX's Corporate Governance Guidelines, Board of Director Code of Conduct and Code of Ethics, including all applicable, publicly disclosed conflict of interest, confidentiality, stock ownership and insider trading policies and guidelines.

The requirements of proposed Section 3.5 of the By-Laws, which will apply to both the Company's and stockholders' nominees for director, will ensure that NASDAQ OMX has the necessary information about nominees to fulfill its public disclosure requirements. The requirements also will ensure that nominees will comply with the legal obligations, policies and procedures applicable to all NASDAQ OMX directors.

(d) Removal and Replacement of Supermajority Voting Provisions

Consistent with the proposed amendments to remove and replace the supermajority voting provisions in the Charter discussed above, NASDAQ OMX proposes to amend each provision of the By-Laws that currently requires a supermajority vote of stockholders to instead require a ''majority of votes outstanding.'' NASDAQ OMX's By-Laws currently include the following two supermajority voting requirements, each of which conforms with an analogous provision in the Charter.

• *Removal of Directors.* Section 4.6 provides that any or all of the directors may be removed from office at any time by the affirmative vote of at least 66⅔%

[26] *See* proposed Section 3.1(b)(iii)(E) of the By-Laws.

[27] *See* proposed Section 3.1(b)(iii)(F) of the By-Laws.

[28] *See* proposed Section 3.1(b)(iii)(G) of the By-Laws.

[29] *See* proposed Section 3.1(b)(iii)(H) of the By-Laws.

[30] *See* proposed Section 3.1(b)(iii)(I) of the By-Laws.

[31] *See* proposed Section 3.1(b)(iii)(J) of the By-Laws.

[32] *See* proposed Section 3.1(b)(iii)(K) of the By-Laws.

[33] *See* proposed Section 3.1(b)(iii)(L) of the By-Laws.

[34] *See* proposed Section 3.1(b)(iii)(M) of the By-Laws. NASDAQ OMX also proposes to include an exception to each of the aforementioned disclosure requirements for any disclosures with respect to the ordinary course business activities of any broker, dealer, commercial bank, trust company or other nominee who is a Proposing Person solely as a result of being the stockholder directed to prepare and submit the notice required by the By-Laws on behalf of a beneficial owner.

of the total voting power of the Voting Stock, voting together as a single class.[35]

- *Adoption, Alteration, Amendment and Repeal of By-Laws.* Section 11.1 provides that the By-Laws may be altered amended or repealed, or new By-Laws may be adopted, at any meeting of the stockholders by the affirmative vote of the holders of at least 66⅔% of the voting power of the Voting Stock, voting together as a single class.[36]

To conform with the proposed changes to the Charter, NASDAQ OMX proposes to replace each of these supermajority voting requirements with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock. As discussed above with respect to the analogous Charter amendments, NASDAQ OMX believes that a ''majority of outstanding shares'' standard reflects a balanced approach that responds to stockholder feedback while appropriately maintaining NASDAQ OMX's defensive posture against hostile takeovers.

(e) Procedures for Filling Board Vacancies

Section 4.8 of the By-Laws sets forth the procedures to fill a director position that has become vacant, whether because of death, disability, disqualification, removal or resignation. Under the current provisions, if such a vacancy occurs, the Nominating & Governance Committee of the Board shall nominate, and the Board shall elect by majority vote, a person to fill the vacancy. In light of the addition of a right for stockholders to call a special meeting, as discussed above, NASDAQ OMX proposes amendments to Section 4.8 to state explicitly that vacancies on the Board are to be filled by a majority vote of the Board, and not by stockholders. In addition, to prescribe procedures in case multiple Board vacancies occur at the same time, the proposed amendments state that a Board vacancy shall be filled by the majority of the directors, even if there is less than a quorum, or by the sole remaining director, if there is only one director remaining on the Board. The proposed amendments do not change any of the other procedures for filling Board vacancies.

(f) Use of Electronic Means for Certain Notices and Related Waivers

Currently, Section 4.12(a) of the By-Laws provides that notice of any meeting of the Board shall be deemed duly given to a director if, among other methods, the notice is sent to the director at the address last made known in writing to NASDAQ OMX by telegraph, telefax, cable, radio or wireless. Section 4.12(b) of the By-Laws provides that such notice of a board meeting need not be given to any director if waived by the director in writing or by electronic transmission (or by telegram, telefax, cable, radio or wireless and subsequently confirmed in writing or by electronic transmission). NASDAQ OMX proposes amendments to Sections 4.12(a) and (b) to provide that both notices and waivers of such notices can be given by email or other means of written electronic transmission. These amendments are intended merely to expand the means through which notices and waivers of notices may be given, and the amendments do not affect any of the other procedural requirements of Sections 4.12(a) and (b). In addition, the proposed amendments reflect current practices, as a substantial amount of communications between NASDAQ OMX and its directors, outside of Board meetings, occurs through electronic means.

(g) Composition of the Management Compensation Committee

As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act and Rule 10C–1 under the Exchange Act,[37] NASDAQ recently amended its listing rules relating to compensation committees.[38] Since NASDAQ OMX is listed on NASDAQ, it must comply with these listing rules just like any other listed company. NASDAQ OMX therefore proposes amendments to Section 4.13(f) of the By-Laws, which relates to the composition of the Management Compensation Committee of NASDAQ OMX's Board, to conform to the recent amendments to NASDAQ's listing rules. Specifically, NASDAQ OMX proposes to state that the Management Compensation Committee must consist of at least two members and that each member shall meet the eligibility requirements set forth in the rules of The NASDAQ Stock Market.

(h) No Amendment or Repeal of Certain By-Law Amendments

While current Section 11.1 of the By-Laws provides for alteration, amendment, repeal and adoption of By-Laws by the stockholders, current Section 11.2 provides for alteration, amendment, repeal and adoption of By-Laws by the Board. These two sections operate as alternate means to alter, amend, repeal or adopt By-Laws. In other words, the stockholders may alter, amend, repeal or adopt By-Laws without any action by the Board, and vice versa. NASDAQ OMX proposes to add a proviso to Section 11.2 to state that no By-Law adopted by the stockholders shall be amended or repealed by the Board if the By-Law so adopted so provides. This is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholder action to amend or repeal the By-Laws.

(i) Non-Substantive Changes

The remaining proposed By-Law amendments are non-substantive changes, which will simplify and streamline the document. Specifically, NASDAQ OMX proposes minor changes to Section 3.3 to incorporate the new defined term ''Proposing Person,'' to use the term ''nomination'' rather than ''nominee'' for consistency and to correct two cross-references. NASDAQ OMX also proposes to delete obsolete references to the 3.75% Series A Convertible Notes due 2012 and the Series B Convertible Notes due 2012, which are no longer outstanding, in Section 12.7.

In addition, NASDAQ OMX proposes to correct typographical errors and/or delete obsolete cross-references in Article I(f), Section 4.3, Section 9.4(b), Section 12.5 and Section 12.6. Finally, NASDAQ OMX proposes to renumber and reorganize the provisions of the By-Laws, where necessary following the other amendments.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[39] in general, and furthers the objectives of Section 6(b)(5) of the Act,[40] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

In response to feedback from its investors, NASDAQ OMX is proposing

[35] This provision is analogous to Article Fifth, Paragraph D of the Charter, which is discussed under Section (ii)(a) above.

[36] This provision is analogous to Article Eighth, Paragraph A of the Charter, which is discussed under Section (ii)(a) above.

[37] *See* Public Law 111–203, 124 Stat. 1376 (2010) and 17 CFR 240.10C–1.

[38] *See* Securities Exchange Act Release No. 68640 (January 11, 2013), 78 FR 4554 (January 22, 2013) (SR–NASDAQ–2012–109). Among other things, the amendments require each NASDAQ-listed company, with certain exceptions, to have a compensation committee of its board of directors, consisting of a minimum of two independent directors who meet additional eligibility requirements relating to compensatory fees and affiliation.

[39] 15 U.S.C. 78f(b).

[40] 15 U.S.C. 78f(b)(5).

changes to its Charter to replace each supermajority voting requirement with a ''majority of outstanding shares'' voting standard. NASDAQ OMX believes this approach will strike an appropriate balance between responding to stockholder feedback and protecting the Company and its investors against hostile takeovers. In addition, the clarifying changes to the Charter will protect investors by making the Charter more concise and easier to understand. Both sets of changes to the Charter were approved by NASDAQ OMX's investors at the most recent annual meeting of stockholders.

NASDAQ OMX also proposes to eliminate the Certificate of Designation relating to the Series A Convertible Preferred Stock, which is no longer outstanding. This proposed change will protect investors by enhancing the clarity of NASDAQ OMX's Charter.

Finally, NASDAQ OMX proposes changes to its By-Laws: (i) To implement a stockholder right to call a special meeting; (ii) to enhance the ''advance notice'' procedures; (iii) to require certain information and agreements from director-nominees; (iv) to remove and replace the supermajority voting provisions to conform to the Charter amendments; (v) to clarify the procedures for filling Board vacancies; (vi) to allow the use of electronic means for certain notices and waivers; (vii) to conform the composition requirements for the Management Compensation Committee of NASDAQ OMX's Board with the NASDAQ listing rules; (vii) [sic] to prevent the Board from amending or repealing By-Law amendments approved by the stockholders; and (viii) [sic] to make other non-substantive changes.

The proposals relating to the stockholder right to call a special meeting and to remove and replace the supermajority voting requirements are responsive to feedback from NASDAQ OMX's stockholders. The additional procedural requirements relating to special and annual meetings will protect investors by stating clearly and explicitly the procedures stockholders must follow to propose business at such meetings. The requirement for certain information and agreements from director-nominees will enhance investor protection by ensuring that nominees provide adequate information about themselves and also comply with applicable law and certain NASDAQ OMX policies and procedures relating to the Board. The prohibition on the Board amending or repealing By-Law amendments approved by the stockholders is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholders' wishes. Finally, the remaining changes are clarifying in nature, and they enhance investor protection by conforming NASDAQ OMX's governance documents to current practices and applicable rules and by making them clearer and easier to understand.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of NASDAQ OMX and not to the operations of the Exchange, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2013–057 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2013–057. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2013–057, and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–29610 Filed 12–11–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71007; File No. SR–CBOE–2013–117]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Options Regulatory Fee

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2]

[41] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice is hereby given that on November 27, 2013, the Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') proposes to amend the Options Regulatory Fee. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has reevaluated the current amount of the Options Regulatory Fee (''ORF'') in connection with its annual budget review. In light of increased regulatory costs, including the hiring of many new regulatory employees, and expected volume levels for 2014, the Exchange proposes to increase the ORF from $.0074 per contract to $.0095 per contract. The proposed fee change would be operative on January 1, 2014.

The ORF is assessed by the Exchange to each Trading Permit Holder for all options transactions executed or cleared by the Trading Permit Holder that are cleared by The Options Clearing Corporation (''OCC'') in the customer range (i.e., transactions that clear in a customer account at OCC) regardless of the marketplace of execution. In other words, the Exchange imposes the ORF on all customer-range transactions executed by a Trading Permit Holder, even if the transactions do not take place on the Exchange.[3] The ORF also is charged for transactions that are not executed by a Trading Permit Holder but are ultimately cleared by a Trading Permit Holder. In the case where a Trading Permit Holder executes a transaction and a different Trading Permit Holder clears the transaction, the ORF is assessed to the Trading Permit Holder who executed the transaction. In the case where a non-Trading Permit Holder executes a transaction and a Trading Permit Holder clears the transaction, the ORF is assessed to the Trading Permit Holder who clears the transaction. The ORF is collected indirectly from Trading Permit Holders through their clearing firms by OCC on behalf of the Exchange.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of Trading Permit Holder customer options business, including performing routine surveillances, investigations, examinations, financial monitoring, as well as policy, rulemaking, interpretive and enforcement activities. The Exchange believes that revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees and fines, will cover a material portion, but not all, of the Exchange's regulatory costs. The Exchange notes that its regulatory responsibilities with respect to Trading Permit Holder compliance with options sales practice rules have largely been allocated to FINRA under a 17d–2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission. The Exchange notifies Trading Permit Holders of adjustments to the ORF via regulatory circular.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[4] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[5] which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[6] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee change is reasonable because it would help the Exchange offset increased regulatory expenses, in particular the hiring of many new regulatory employees, but would not result in total regulatory revenue exceeding total regulatory costs. The Exchange believes the ORF is equitable and not unfairly discriminatory in that it is charged to all Trading Permit Holders on all their transactions that clear in the customer range at the OCC. Moreover, the Exchange believes the ORF ensures fairness by assessing higher fees to those Trading Permit Holders that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., Trading Permit Holder proprietary transactions) of its regulatory program.[7]

[3] Exchange rules require each Trading Permit Holder to record the appropriate account origin code on all orders at the time of entry in order to allow the Exchange to properly prioritize and route orders and assess transaction fees pursuant to the rules of the Exchange and report resulting transactions to the OCC. CBOE order origin codes are defined in CBOE Regulatory Circular RG13–038. The Exchange represents that it has surveillances in place to verify that Trading Permit Holders mark orders with the correct account origin code.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] *Id.* [sic]

[7] If the Exchange changes its method of funding regulation or if circumstances otherwise change in the future, the Exchange may decide to modify the ORF or assess a separate regulatory fee on Trading

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues. Rather, the proposed rule change is designed to help the Exchange to adequately fund its regulatory activities while seeking to ensure that total regulatory revenues do not exceed total regulatory costs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [8] and paragraph (f) of Rule 19b–4 [9] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2013–117 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2013–117. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–CBOE–2013–117 and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

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Permit Holder proprietary transactions if the Exchange deems it advisable.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71016; File No. SR–NYSEArca–2013–136]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Options Fee Schedule To Raise the Take Liquidity Fee for Lead Market Maker and Market Maker Electronic Executions in Penny Pilot Issues

December 6, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 26, 2013, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule (''Fee Schedule'') to raise the Take Liquidity fee for Lead Market Maker (''LMM'') and Market Maker electronic executions in Penny Pilot Issues. The Exchange proposes to implement the fee change effective December 1, 2013. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to raise the Take Liquidity fee for LMM and Market Maker electronic executions in Penny Pilot Issues.[4] The Exchange proposes to implement the fee change effective December 1, 2013.[5] Currently, the Exchange charges a Take Liquidity fee of $0.47 per contract for LMM and Market Maker electronic executions in Penny Pilot Issues. The Exchange proposes to raise the Take Liquidity fee to $0.48 per contract for LMM and Market Maker electronic executions in Penny Pilot Issues in order to keep the fee in the same range as other exchanges[6] and generate revenue that will help support credits offered to market participants that post liquidity. The Exchange does not propose to make any other changes to the fees for electronic executions in Penny Pilot Issues. Take Liquidity fees will remain at $0.48 for Firms and Broker Dealers and $0.45 for Customers.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[8] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that raising the Take Liquidity fee from $0.47 per contract to $0.48 per contract for LMM and Market Maker electronic executions in Penny Pilot Issues will result in the Exchange's fees for taking liquidity in Penny Pilot issues remaining comparable to fees charged by at least one other exchange.[9] In addition, the proposed fee change is reasonable because it will generate revenue that will help to support the credits offered for posting liquidity, which are available to all market participants.

The Exchange believes that the proposed fee increase is equitable and not unfairly discriminatory because the Exchange would uniformly assess all market participants, except Customers, the same Take Liquidity fee of $0.48 per contract. Customer order flow benefits the market by increasing liquidity, which benefits all market participants; thus Customers are assessed lower fees. Also, LMMs and Market Makers have the ability to earn a higher Post Liquidity credit of $0.28 per contract for electronic executions in Penny Pilot Issues compared to the $0.10 per contract Post Liquidity Credit that is available to Firms and Broker Dealers. This is equitable and not unfairly discriminatory because LMMs and Market Makers have obligations to quote and commit capital, both of which contribute to market quality and price discovery on the Exchange. Firms and Broker Dealers do not have such obligations.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition. For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[10] the Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee will allow the Exchange to remain competitive with other exchanges by keeping its fees in a similar range.[11] The Exchange believes that the proposed fee change reduces the burden on competition because it takes into account the value that various market participants add to the marketplace, as discussed above. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change promotes a competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[12] of the Act and subparagraph (f)(2) of Rule 19b–4[13] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[14] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[4] As provided under NYSE Arca Options Rule 6.72, options on certain issues have been approved to trade with a minimum price variation of $0.01 as part of a pilot program that is currently scheduled to expire on December 31, 2013. *See* Securities Exchange Act Release No. 69790, (June 18, 2013) 78 FR 37853 (June 24, 2013) (SR–NYSEArca–2013–59).

[5] The Exchange notes that it has previously filed with the Securities and Exchange Commission a proposed rule change to amend the Fee Schedule relating to co-location fees (File No. SR–NYSEArca–2013–131). Exhibit 5 to SR–NYSEArca–2013–131 specified an effective date for the revised Fee Schedule of December 3, 2013 (changed from November 8, 2013). Exhibit 5 to the instant proposed rule change specifies an effective date of December 1, 2013 (changed from November 8, 2013). On December 1, 2013, the Exchange will update the Fee Schedule to reflect the fee change reflected in the instant proposed rule change, with an effective date of December 1, 2013. On December 3, 2013, the Exchange, subject to effectiveness of SR–NYSEArca–2013–131, will further update the Fee Schedule to reflect the changes set forth in SR–NYSEArca–2013–131, with an effective date of December 3, 2013.

[6] For example, NASDAQ Options Market (''NOM'') charges Firms, Professionals, and Non-NOM Market Makers, NOM Market Makers, and Broker-Dealers $0.48 per contract for removing liquidity in Penny Pilot Options while Customers are charged $0.45 per contract. *See* NASDAQ Options Rules Chapter XV, Section 2, and Securities Exchange Act Release No. 70820, (November 6, 2013) 78 FR 68122 (November 13, 2013) (SR–NASDAQ–2013–136).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4) and (5).

[9] *See supra* note 6.

[10] 15 U.S.C. 78f(b)(8).

[11] *See supra* note 6.

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(2).

[14] 15 U.S.C. 78s(b)(2)(B).

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2013–136 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2013–136. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2013–136, and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–29615 Filed 12–11–13; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71008; File No. SR–NASDAQ–2013–146]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Routing Fees

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 27, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to modify Chapter XV, Section 2, entitled ''NASDAQ Options Market—Fees and Rebates,'' which governs pricing for NASDAQ members using the NASDAQ Options Market (''NOM''), NASDAQ's facility for executing and routing standardized equity and index options, to amend Routing Fees.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on December 2, 2013.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend the Routing Fees in Section 2(3) of Chapter XV in order to recoup costs the Exchange incurs for routing and executing certain orders in equity options to away markets. Today, the Exchange assesses a Non-Customer a $0.95 per contract Routing Fee to any options exchange. The Customer Routing Fee for option orders routed to NASDAQ OMX PHLX LLC (''PHLX'') is a $0.05 per contract Fixed Fee in addition to the actual transaction fee assessed. The Customer Routing Fee for option orders routed to NASDAQ OMX BX, Inc. (''BX Options'') is $0.00 per contract. The Customer Routing Fee for option orders routed to all other options exchanges[3] (excluding PHLX and BX Options) is a fixed fee of $0.15 per contract (''Fixed Fee'') in addition to the actual transaction fee assessed. If the away market pays a rebate, the Routing Fee is $0.00 per contract.[4]

The Exchange proposes to increase the Customer Routing Fixed Fee of $0.15 per contract when an option order is routed to all other exchanges to $0.20 per contract. With respect to the fixed costs, the Exchange incurs a fee when it utilizes Nasdaq Options Services LLC (''NOS''), a member of the Exchange and the Exchange's exclusive order router.[5] Each time NOS routes an order to an away market, NOS is charged a clearing fee[6] and, in the case of certain exchanges, a transaction fee is also charged in certain symbols, which fees are passed through to the Exchange. The Exchange currently recoups clearing and transaction charges incurred by the Exchange as well as certain other costs incurred by the Exchange when routing to away markets, such as administrative and technical costs associated with operating NOS, membership fees at

[3] Including BATS Exchange, Inc. (''BATS''), BOX Options Exchange LLC (''BOX''), the Chicago Board Options Exchange, Incorporated (''CBOE''), C2 Options Exchange, Incorporated (''C2''), International Securities Exchange, LLC (''ISE''), the Miami International Securities Exchange, LLC (''MIAX''), NYSE Arca, Inc. (''NYSE Arca''), NYSE MKT LLC (''NYSE Amex'') and Topaz Exchange, LLC (''Gemini'').

[4] For all Routing Fees, the transaction fee will continue to be based on the away market's actual transaction fee or rebate for particular market participants and in the case that there is no transaction fee or rebate assessed by the away market, the fixed fee.

[5] *See* NASDAQ Rules at Chapter VI, Section 11(e) (Order Routing).

[6] The Options Clearing Corporation (''OCC'') assesses $0.01 per contract side.

away markets, Options Regulatory Fees (''ORFs'') and technical costs associated with routing options. The Exchange assesses the actual away market fee at the time that the order was entered into the Exchange's trading system. This transaction fee would be calculated on an order-by-order basis since different away markets charge different amounts.

A new market entrant recently adopted an ORF.[7] The Exchange proposes to increase its Fixed Fee from $0.15 to $0.20 per contract to recoup costs associated with increased costs.

2. Statutory Basis

NASDAQ believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of Section 6(b)(4) and (b)(5) of the Act[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed Routing Fees are reasonable because they seek to recoup costs that are incurred by the Exchange when routing Customer, Firm, Market Maker and Professional orders to away markets on behalf of members. Each destination market's transaction charge varies and there is a cost incurred by the Exchange when routing orders to away markets. The costs to the Exchange include clearing costs, administrative and technical costs associated with operating NOS, membership fees at away markets, ORFs and technical costs associated with routing options. The Exchange believes that the proposed Routing Fees would enable the Exchange to recover the costs it incurs to route orders to away markets in addition to transaction fees assessed to market participants for the execution of Customer, Firm, Market Maker and Professional orders by the away market. Specifically, new entrants have added costs associated with routing.[10] The Exchange believes that it is reasonable to recoup these costs borne by the Exchange on each transaction. The $0.20 per contract Customer Routing Fixed Fee, which is assessed when an option order is routed to all other exchanges, represents the overall cost to the Exchange for technical, administrative, clearing, regulatory, compliance and other costs, in addition to the transaction fee assessed by the away market.

In addition, the Exchange believes that it is equitable and not unfairly discriminatory to assess a $0.20 per contract Customer Routing Fixed Fee when an option order is routed to all other exchanges because this fee would be assessed uniformly on all market participants in addition to the actual transaction fees on all orders routed to non-NASDAQ OMX markets.

The Exchange believes that it is equitable and not unfairly discriminatory to assess a fixed cost of $0.05 per contract to route orders to PHLX and no cost to route to BX Options because the cost, in terms of actual cash outlays, to the Exchange to route to those markets is lower. For example, costs related to routing to PHLX and BX Options are lower as compared to other away markets because NOS is utilized by all three exchanges to route orders.[11] NOS and the three NASDAQ OMX options (PHLX, BX Options and NOM) markets have a common data center and staff that are responsible for the day-to-day operations of NOS. Because the three exchanges are in a common data center, Routing Fees are reduced because costly expenses related to, for example, telecommunication lines to obtain connectivity are avoided when routing orders in this instance. The costs related to connectivity to route orders to other NASDAQ OMX exchanges are de minimis. When routing orders to non-NASDAQ OMX exchanges, the Exchange incurs costly connectivity charges related to telecommunication lines and other related costs. The Exchange believes it is reasonable, equitable and not unfairly discriminatory to pass along savings realized by leveraging NASDAQ OMX's infrastructure and scale to market participants when those orders are routed to PHLX and BX Options. Orders are routed to away markets in accordance with Exchange rules based on price.[12] Market participants may submit orders to the Exchange as ineligible for routing or ''DNR'' to avoid incurring the Routing Fees proposed herein.[13]

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the rule change would allow the Exchange to recoup its costs when routing orders designated as available for routing by the market participant. NOM Participants may choose to mark the order as ineligible for routing to avoid incurring these fees.[14] Today, other options exchanges also assess similar fees to recoup costs incurred when routing orders to away markets.

With respect to continuing to route orders to PHLX and BX Options at a lower cost as compared to other away markets, the Exchange does not believe that the proposed amendments to increase those fees, while maintaining the same fee differential imposes a burden because all market participants would be assessed the same fees depending on the away market. Also, the Exchange is proposing to recoup costs incurred only when members request the Exchange route their orders to an away market. The Exchange is passing along savings realized by leveraging NASDAQ OMX's infrastructure and scale to market participants when those orders are routed to Phlx and BX Options and is providing those saving to all market participants. Finally, the Exchange routes orders to away markets where the Exchange's disseminated bid or offer is inferior to the national best bid (best offer) price and based on price first.[15]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[16] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is

[7] Gemini adopted an ORF of $0.0010 per contract. *See* Securities Exchange Act Release No. 70200 (August 14, 2013), 78 FR 51242 (August 20, 2013) (SR–Topaz–2013–01).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4), (5).

[10] *See* note 8 [sic].

[11] *See* Chapter VI, Section 11 of the NASDAQ and BX Options Rules and PHLX Rule 1080(m)(iii)(A).

[12] *See* NASDAQ Rules at Chapter XII (Options Order Protection and Locked and Crossed Market Rules).

[13] *See* NASDAQ Rules at Chapter VI, Section 11(e) (Order Routing).

[14] *See* NASDAQ Rules at Chapter VI, Section 11(e) (Order Routing).

[15] *See* NASDAQ Rules at Chapter XII (Options Order Protection and Locked and Crossed Market Rules).

[16] 15 U.S.C. 78s(b)(3)(A)(ii).

necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2013–146 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2013–146. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2013–146 and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–29607 Filed 12–11–13; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71022; File No. SR–OCC–2013–17]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change Concerning Charters for the Board of Directors, the Membership/Risk Committee, the Audit Committee and the Performance Committee

December 6, 2013.

I. Introduction

On October 17, 2013, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–OCC–2013–17 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on October 30, 2013.[3] The Commission received no comments concerning the proposed rule change. For the reasons set forth below, the Commission is approving the proposed rule change.

II. Description

The proposed rule change concerns the charter of OCC's Board of Directors (''Board''), as well as the charters of the Board's Membership/Risk Committee (''MRC''), Audit Committee (''AC''), and Performance Committee (''PC'') (collectively, ''Committee Charters'').[4]

Board of Directors Charter

The Board's new charter (''Board Charter'') does not impose any new responsibilities on the Board, but rather reflects the existing powers and duties of the Board under OCC's By-Laws and Rules, as well as the underlying practices that have been developed to aid the Board in meeting its obligations. According to OCC, the Board adopted a charter in an effort to provide outside parties with greater transparency into the Board's oversight activities, to promote accountability, and to align OCC with current best practices in corporate governance.

The Board Charter addresses the organization, composition, authority, functions, and responsibilities of the Board. With respect to membership, the Board Charter sets forth the size and composition of the Board, the qualifications for Board membership, and the term, tenure, and age limits applicable to each category of Board member. The Board Charter also addresses Board meetings, specifying that the Board will meet at least five times annually, that the Chairman of the Board will establish the agenda for each meeting in consultation with the President and Secretary, and that individual Directors must prepare for and attend each Board meeting. Additionally, the Board Charter incorporates many provisions of OCC's existing By-Laws, including those governing the election, resignation, and disqualification of Directors,[5] the establishment of Board committees and subcommittees, and the existence of a quorum.

The Board Charter also defines the scope of the Board's authority, providing, among other things, that the Board may make any inquiries it deems appropriate in executing its duties, and that the Board may confer with OCC management or employees as needed.[6] The Board Charter reiterates the Board's authority under the By-Laws to elect certain corporate officers annually, to form such committees and subcommittees as it deems appropriate, and to delegate authority to committee members.

The Board Charter describes the Board's cardinal duty as overseeing OCC to ensure that it is managed and operates in a manner that is consistent with OCC's regulatory responsibilities. The Board is also tasked with

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 70753 (October 24, 2013), 78 FR 65027 (October 30, 2013) (SR–OCC–2013–17).

[4] OCC's Board adopted its charter on March 7, 2013. Although OCC has had charters for its MRC, AC, and PC in place for a number of years, it has not previously submitted those as proposed rule changes pursuant to Section 19(b) of the Act.

[5] The Board Charter currently reflects that the Board has one Management Director, who is both the Chairman of the Board and Chief Executive Officer of OCC. OCC intends to split the office of the Chairman into two offices, Executive Chairman and President, both of whom will be elected as Management Directors. *See* Securities Exchange Act Release No. 70076 (July 30, 2013), 78 FR 47449 (August 5, 2013) (SR–OCC–2013–09).

[6] The Chairman is permitted to ask OCC management or others to attend meetings and provide pertinent information. The Board may also hire specialists or rely on outside advisors or specialists.

stewarding OCC to ensure it has the ability to achieve its objectives in a safe, sound, and prudential manner. The Board Charter reiterates many of the Board's responsibilities under OCC's By-Laws, including the obligations to determine disqualifications from Board service, to fill vacancies, to conduct hearings in connection with a denial or suspension of membership, and to suspend clearing members when appropriate. The Board Charter also lists additional Board responsibilities that do not appear in the By-Laws.[7]

The Board Charter also sets forth the duties and responsibilities of individual Directors, including the duty to act in good faith in the best interests of OCC, as well as with due regard for the fiduciary responsibilities owed to OCC as a systemically important financial market utility.[8] Directors are also required to comply with the provisions of the Code of Conduct for OCC Directors, including the provisions relating to conflicts of interest and confidentiality.

Committee Charters

OCC has long maintained Charters for the MRC, AC, and PC (each, a ''Committee,'' and collectively, the ''Committees''). These Committee Charters describe the purpose of each Committee as assisting the Board in fulfilling certain of its oversight responsibilities. The Committee Charters further specify the policies and procedures governing the membership,[9] organization, scope of authority, functions, and responsibilities of each Committee.

With respect to meetings, each Committee Charter establishes the Committee's meeting schedule, quorum rules, minute-keeping, and reporting requirements. Each Committee Charter further provides that the meeting agenda is established by the Committee's chairman, or his or her designee, in consultation with the Secretary and OCC's management. A majority of the Committee members constitutes a quorum, and if the chairman is not present at a meeting, the members who are present must designate one of their number to serve as acting chairman. All Committees are permitted to call executive sessions from which guests of such Committee may be excluded, and Committee members are permitted to participate in all meetings by teleconference or similar means.[10]

Each Committee's charter describes the scope of its authority, which includes the power to act, subject to the Board's direction, with respect to any matter necessary or appropriate to accomplish the purpose and responsibilities set forth in the Committee's Charter, as well as the power to delegate this authority to any subcommittee that the Committee may form. Each Committee is also authorized to make inquiries into any matter related to its respective purpose and responsibilities,[11] and to confer with OCC's management and other employees as it deems appropriate. Additionally, the chair of each Committee is authorized to act on behalf of his or her Committee in the event immediate action is required and it is impractical to convene such Committee.[12]

Each Committee Charter sets forth a detailed list of the Committee's respective functions and responsibilities, and also requires each Committee to review its charter annually and to submit any revised charters to OCC's Board for reapproval.

III. Discussion

Section 19(b)(2)(C) of the Act[13] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act[14] requires that the rules of a registered clearing agency be designed to, among other things, promote the prompt and accurate clearance and settlement of securities transactions, as well as protect investors and the public interest. The Commission finds that the proposed rule change is consistent with the Act's requirements because the new and revised Board charters will clarify the responsibilities and operations of OCC's Board and its committees. This clarity will help ensure that OCC maintains a robust and transparent governance structure that should promote the prompt and accurate clearance and settlement of securities transactions, and should further safeguard investors and the public interest.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act, particularly the requirements of Section 17A of the Act[15] and the rules and regulations thereunder applicable to OCC.

It is therefore *ordered,* pursuant to Section 19(b)(2) of the Act,[16] that proposed rule change SR–OCC–2013–17 be and hereby is *approved.*[17]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[18]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–29621 Filed 12–11–13; 8:45 am]

BILLING CODE 8011–01–P

[7] These additional responsibilities include the following: (i) To oversee OCC's governance processes; (ii) to approve and oversee OCC's business strategies; (iii) to monitor OCC's performance in delivering clearance and settlement services; (iv) to oversee OCC's processes and framework for assessing, managing, and monitoring strategic, financial, and operational risk; (v) to oversee OCC's financial reporting, auditing, accounting, and compliance processes; (vi) to oversee OCC's system of internal controls; (vii) to foster processes designed to ensure that OCC complies with applicable laws and regulations, and that OCC operates in an ethical manner; (viii) to oversee OCC's major capital expenditures and approve the annual budget and corporate plan; (ix) to oversee the development and design of employee compensation, incentive, and benefit programs; (x) to evaluate senior management performance regularly and approve the compensation of the Chairman and President; and (xi) to assure management succession.

[8] On July 18, 2012, the Financial Stability Oversight Council (''FSOC'') designated OCC as a systemically important financial market utility under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Financial Stability Oversight Council, 2012 Annual Report, Appendix A, p.145, available at *http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf.*

[9] Each Committee Charter requires the inclusion of at least one Public Director and empowers the Board to remove or replace any Committee member at any time.

[10] Meeting minutes must be kept and shared with the Board.

[11] The Committee Charters further permit each Committee to hire specialists or rely on outside advisors or specialists to assist in carrying out the Committee's activities, and further confirm the Committees' authority to approve any related terms of retention and fees. The MRC and PC's authority under these provisions, however, is subject to Board approval.

[12] In such instances, the committee chair must, as soon as practicable, seek ratification from the full committee for any actions the chair has taken unilaterally.

[13] 15 U.S.C. 78s(b)(2)(C).

[14] 15 U.S.C. 78q–1(b)(3)(F).

[15] 15 U.S.C. 78q–1.

[16] 15 U.S.C. 78s(b)(2).

[17] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71010; File No. SR–Phlx–2013–115]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing of Proposed Rule Change To Amend the Restated Certificate of Incorporation and By-Laws of The NASDAQ OMX Group, Inc.

December 6, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 27, 2013, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing this proposed rule change with respect to amendments of the Restated Certificate of Incorporation (the ''Charter'') and By-Laws (the ''By-Laws'') of its parent corporation, The NASDAQ OMX Group, Inc. (''NASDAQ OMX'' or the ''Company''). The proposed amendments will be implemented on a date designated by NASDAQ OMX following approval by the Commission. The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ OMX is proposing to make certain amendments to its Charter and By-Laws.

(i) Background

At NASDAQ OMX's 2012 annual meeting held on May 22, 2012, NASDAQ OMX's stockholders considered two proposals submitted by individual stockholders. The first proposal, which passed with 68% of the votes cast, requested that NASDAQ OMX's Board take steps to replace each supermajority voting standard in the Charter and By-Laws[3] with a voting standard requiring a ''majority of votes cast.'' The second proposal, which did not pass but received 49% of the votes cast, requested that NASDAQ OMX's Board take steps to enable stockholders having at least one-tenth of NASDAQ OMX's voting power to call a special meeting of stockholders.

Following the 2012 annual meeting, the Nominating & Governance Committee of NASDAQ OMX's Board reviewed the voting results on the two stockholder proposals and discussed the stockholder voting standards and rights contemplated by the Charter and By-Laws. Following this review, the Nominating & Governance Committee recommended to the Board, and the Board approved, certain changes to the Charter and By-Laws to address the two stockholder proposals and make other changes. NASDAQ OMX now proposes to make these changes, which are described further below.

(ii) Proposed Amendments to Charter

(a) Removal and Replacement of Supermajority Voting Requirements

To respond to feedback from its stockholders, NASDAQ OMX proposes to replace each supermajority voting requirement in the Charter with a ''majority of outstanding shares'' voting requirement. The Charter currently includes the following three supermajority voting requirements.

• *Removal of Directors.* Article Fifth, Paragraph D provides that, except for directors elected by the holders of any series of preferred stock, any director, or the entire Board, may be removed from office at any time, but only by the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors (the ''Voting Stock''), voting together as a single class.

• *Adoption, Alteration, Amendment and Repeal of By-Laws.* Article Eighth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the total voting power of the outstanding Voting Stock, voting together as a single class, shall be required in order for the stockholders to adopt, alter, amend or repeal any By-Law.

• *Adoption, Alteration, Amendment and Repeal of Certain Charter Provisions.* Article Ninth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the voting power of the outstanding Voting Stock, voting together as a single class, shall be required to amend, repeal or adopt any provision inconsistent with paragraph C of Article Fourth,[4] Article Fifth,[5] Article Seventh,[6] Article Eighth[7] or Article Ninth of the Charter.[8]

In each of the three provisions described above, NASDAQ OMX proposes to remove the requirement for an affirmative vote of at least 66⅔% of the total voting power of the Voting Stock and replace it with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock. In developing this proposal, NASDAQ OMX considered the relative weight of the arguments for and against supermajority voting requirements. Historically, supermajority voting requirements have protected corporations against coercive takeover tactics by requiring broad stockholder support for certain types of transactions or governance changes. However, in recent years, corporate governance standards have evolved, and many stockholder rights advocates argue that supermajority voting requirements

[3] These provisions, which are described further below, require the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock to approve certain actions.

[4] Paragraph C of Article Fourth sets forth the 5% voting limitation, which provides that holders of NASDAQ OMX's voting securities may not cast votes in excess of 5% of NASDAQ OMX's outstanding voting securities. To be clear, NASDAQ OMX is not proposing any change to the 5% voting limitation itself. NASDAQ OMX only proposes that any future amendment of the 5% voting limitation will require the approval of stockholders holding a majority of the outstanding shares, rather than stockholders holding 66⅔% of the outstanding shares.

[5] Article Fifth includes certain provisions relating to the Board, such as Board size and director elections.

[6] Article Seventh prohibits stockholder action by written consent.

[7] Article Eighth establishes the procedures to adopt, alter, amend or repeal the By-Laws.

[8] Article Ninth establishes the procedures to adopt, alter, amend or repeal the Charter.

limit stockholders' participation in corporate governance. NASDAQ OMX believes that while it is important to protect against coercive takeover tactics, it is also critically important to obtain stockholder input and respond to stockholder concerns about corporate governance.

NASDAQ OMX believes that the proposed ''majority of outstanding shares'' voting requirement will continue to provide some protection against proposals that are harmful to the stockholders. While this requirement is less difficult to satisfy than a supermajority voting requirement, it is more difficult to satisfy than a ''majority of votes cast'' requirement, which NASDAQ OMX considered as an alternate option. NASDAQ OMX believes that a ''majority of outstanding shares'' standard is a balanced outcome that responds to stockholder feedback while appropriately maintaining NASDAQ OMX's defensive posture against hostile takeovers.

(b) Non-Substantive Changes

NASDAQ OMX also proposes to amend and restate the Charter to make other non-substantive changes. Specifically, the proposal deletes obsolete references to the following:

- The 3.75% Series A Convertible Notes due 2012 and the 3.75% Series B Convertible Notes due 2012, which are no longer outstanding, in Article Fourth, Paragraph C and Article Eleventh;
- a voting trust agreement, which is no longer in effect, in Article Fourth, Paragraph C(3)(b)(iii);
- ownership of NASDAQ OMX securities by the National Association of Securities Dealers, Inc., certain affiliates of Hellman & Friedman LLC, and certain affiliates of Silver Lake, none of which currently own any NASDAQ OMX securities, in Article Fourth, Paragraph C(6); [9] and
- the phase-out of the classified board structure, which was complete in 2007, in Article Fifth, Paragraph B.

In Article Fifth, Paragraph B, the proposal also clarifies that the election of directors by stockholders shall occur at an annual or special meeting. The proposal corrects a typographical error in Article Fifth, Paragraph A and renumbers the provisions of the Charter, where necessary following the other amendments. Finally, the proposal amends the introductory and concluding language of the Charter to incorporate language that will be required under Delaware law when the amended and restated Charter is filed with the Secretary of State of the State of Delaware.[10]

The amendment and restatement of the Charter to incorporate these non-substantive changes will simplify and streamline the document.

(iii) Proposed Elimination of Certificate of Designation

NASDAQ OMX proposes to eliminate its Certificate of Designation, Preferences and Rights of Series A Convertible Preferred Stock (the ''Series A Convertible Preferred Stock''), and all matters set forth therein. The Series A Convertible Preferred Stock was created in 2009 to facilitate the conversion of certain notes into common stock.[11] The Company authorized 2 million shares of the Series A Convertible Preferred Stock and immediately issued 1.6 million of those shares to the converting noteholders.

In 2010, following stockholder approval, all 1.6 million issued shares of the Series A Convertible Preferred Stock were converted into common stock. Since then, no shares of the Series A Convertible Preferred Stock have been outstanding, and the Company has no intention to issue further shares of this series.

As a clean-up matter, the Company seeks to file a certificate of elimination with the Secretary of State of the State of Delaware to eliminate the Series A Convertible Preferred Stock. Under Delaware law, a certificate of elimination is deemed to be an amendment to NASDAQ OMX's Charter; however, since the amendment is limited in scope, it does not require the approval of NASDAQ OMX's stockholders.[12]

(iv) Proposed Amendments to the By-Laws

(a) Special Meetings of Stockholders

Current Section 3.2 of NASDAQ OMX's By-Laws provides that only NASDAQ OMX may call special meetings of its stockholders.[13] To respond to feedback from its stockholders, as discussed above, NASDAQ OMX proposes to delete this provision and replace it with language that will allow NASDAQ OMX's stockholders to call special meetings after following particular procedures. Similar to the elimination of supermajority voting requirements, which is discussed above, the implementation of the right of stockholders to call a special meeting has received recent attention from investor and corporate governance advocates. These advocates argue that such a right will enable stockholders to raise and act on matters that arise between annual meetings.

Following discussions with some of its stockholders, NASDAQ OMX agrees that it is appropriate to allow stockholders who meet certain procedural requirements to call a special meeting. In proposing these procedural requirements, NASDAQ OMX's goals are to ensure timely notice of a meeting request and to gather sufficient information about the proposing stockholder(s) and the

[9] NASDAQ OMX notes that the remaining text of Article Fourth, Paragraph C(6) of the Charter includes an obsolete cross-reference to Section 6(b) of Article Fourth, Paragraph C in the second sentence, which begins ''The Board, however, may not approve an exemption under Section 6(b). . . .'' NASDAQ OMX cannot correct this cross-reference, which should refer to Section 6 without further reference to a subsection (b), without seeking further approval of its stockholders, which would require NASDAQ OMX to call and hold a stockholder meeting. Generally, NASDAQ OMX holds stockholder meetings, which are time consuming and expensive, only once or twice a year. Moreover, it is atypical of a large public company like NASDAQ OMX to submit a proposal to its stockholders solely to correct a cross-reference in its Charter. However, NASDAQ OMX believes, following consultation with outside counsel, that it is clear, based on the drafting history of this provision, that the intent of the cross-reference is to refer to Section 6 of Article Fourth, Paragraph C of the Charter. In other words, the second sentence of Article Fourth, Paragraph C(6) should read: ''The Board, however, may not approve an exemption under Section 6: (i) for a registered broker or dealer or an Affiliate thereof or (ii) an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act.'' Under no circumstances will NASDAQ OMX read the obsolete cross-reference to imply that the Board could grant an exemption to the ownership limitation in Article Fourth, Paragraph C(6) of the Charter for a registered broker or dealer or an Affiliate thereof, or an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act. NASDAQ OMX also notes that it is proposing amendments to Section 12.5 of the By-Laws to eliminate cross-references to subsection (b) of Article Fourth, Paragraph C(6) of the Charter. Finally, NASDAQ OMX notes that there are some differences in language between the second sentence of Article Fourth, Paragraph C(6) of the Charter and the second sentence of Section 12.5 of the By-Laws. To the extent that these differences would cause a difference in interpretation, NASDAQ OMX notes, following consultation with outside counsel, that the Charter language shall prevail. As soon as feasible, NASDAQ OMX plans to present a proposal to the stockholders to conform this provision of the Charter to the By-Laws.

[10] *See* Sections 242 and 245 of the DGCL.

[11] *See* Securities Exchange Act Release No. 60845 (October 20, 2009), 74 FR 55078 (October 26, 2009) (SR–BX–2009–061, SR–NASDAQ–2009–087, SR–Phlx–2009–88); *see also* Securities Exchange Act Release No. 61000 (November 13, 2009), 74 FR 61390 (November 24, 2009) (SR–BSECC–2009–005); *see also* Securities Exchange Act Release No. 61001 (November 13, 2009), 74 FR 61391 (November 24, 2009) (SR–SCCP–2009–04).

[12] *See* Section 151(g) of the DGCL.

[13] Under Delaware law, special meetings of a corporation's stockholders may be called by the board of directors or by such persons as may be authorized by the certificate of incorporation or the bylaws. *See* Section 211(d) of the DGCL.

proposal. Among other things, this information will ensure that NASDAQ OMX is able to comply with its disclosure and other requirements under applicable law and that NASDAQ OMX, its Board and its stockholders are able to assess the proposal adequately. The proposed procedural requirements are set forth below.

First, proposed Section 3.2(a) provides that special meetings of NASDAQ OMX's stockholders may only be called: (i) At any time by NASDAQ OMX's Board pursuant to a resolution adopted by a majority of the total number of directors NASDAQ OMX would have if there were no vacancies; and (ii) by NASDAQ OMX's Corporate Secretary following the receipt of a written request in proper form for a special meeting (a ''Special Meeting Request'') by one or more stockholders. Such stockholders (the ''Requisite Holders'') must hold of record, in the aggregate, at least 15 percent of NASDAQ OMX's outstanding shares of capital stock entitled to vote on matters to be brought before the special meeting (the ''Requisite Percentage''). Such shares must be ''Net Long Shares,'' [14] and the Requisite Holders must have held the shares continuously for at least one year as of the date of the Special Meeting Request. Whether shares constitute Net Long Shares shall ultimately be decided by NASDAQ OMX's Board in its reasonable determination. The intent of the requirement for stockholders to maintain a ''net long position'' is to limit the ability to call a special meeting to stockholders that have long-term record and economic positions in NASDAQ OMX.

Proposed Section 3.2(a) also sets forth the procedures for determining whether a special meeting has been requested by Requisite Holders representing in aggregate at least the Requisite Percentage if multiple Special Meeting Requests are delivered to NASDAQ OMX's Corporate Secretary. Multiple requests will be considered together only if: (i) Each Special Meeting Request identifies substantially the same purpose or purposes of the special meeting and substantially the same matters proposed to be acted on at the requested special meeting (in each case as determined in good faith by NASDAQ OMX's Board); and (ii) such Special Meeting Requests have been dated and delivered to NASDAQ OMX's Corporate Secretary within 60 days of the earliest dated Special Meeting Request. NASDAQ OMX believes these procedures are reasonable and clear and notes that they grant only limited discretion to NASDAQ OMX's Board in determining whether Special Meeting Requests will be considered together.

Pursuant to proposed Section 3.2(b), if a Special Meeting Request is in proper form, NASDAQ OMX's Board shall determine the place, if any, date and time of the special meeting, and NASDAQ OMX's Corporate Secretary shall call the special meeting within 120 days after the date the Special Meeting Request was delivered. However, NASDAQ OMX's Board may, in lieu of calling a special meeting, present an identical or substantially similar item of business (a ''Similar Item''),[15] as determined in good faith by NASDAQ OMX's Board, for stockholder approval at any other meeting of the stockholders that is held not less than 120 days after the delivery of the Special Meeting Request. The intent of this provision is to save NASDAQ OMX the time and expense of calling and holding a special meeting if NASDAQ OMX intends to hold a separate stockholders' meeting within 120 days. In fixing the place, if any, date and time for any special meeting, NASDAQ OMX's Board may consider such factors as it deems relevant in its business judgment, including the nature of the matters to be considered, the facts and circumstances surrounding any request for a meeting and any plan of the Board to call an annual meeting or a special meeting.

Proposed Section 3.2(c) sets forth certain limitations on Special Meeting Requests. Specifically, a Special Meeting Request will not be valid if:

- It relates to an item of business that is not a proper subject for stockholder action under applicable law;
- it is delivered during the period commencing 90 days prior to the one-year anniversary of the date of the immediately preceding annual meeting and ending on the date of the next annual meeting;
- a Similar Item was presented at any meeting of stockholders held within 120 days prior to the date on which the Special Meeting Request was delivered; or
- a Similar Item is included in NASDAQ OMX's notice of meeting as an item of business to be presented at a stockholder's meeting that has been called but not yet held.

The Board may adjourn or reschedule any previously scheduled special meeting of the stockholders. NASDAQ OMX believes the subject matter limitations set forth in proposed Section 3.2(c) are appropriate in order to comply with applicable law and to prevent multiple considerations of the same item of business. NASDAQ OMX believes the time limits set forth in proposed Section 3.2(c) are appropriate to ensure that NASDAQ OMX is not required to incur the time and expense of calling and holding a special meeting of stockholders immediately prior to an upcoming annual meeting of stockholders or if a Similar Item of business already has been presented at a recent stockholders' meeting.

To be in proper form, a Special Meeting Request must comply with certain requirements, as described further below.[16] NASDAQ OMX's Board will have the sole discretion to determine whether a Special Meeting Request is in proper form.[17] Proposed Section 3.2(d) sets forth the requirements for a Special Meeting Request to be in proper form. These proposed requirements will ensure that NASDAQ OMX has sufficient information to comply with its disclosure requirements under applicable law and that the Requisite Holders maintain a sufficient ownership level through the date of the special meeting. Specifically, a Special Meeting Request shall:

[14] For purposes of determining Requisite Holders under proposed Section 3.2, ''Net Long Shares'' shall be limited to the number of shares beneficially owned, directly or indirectly, by any stockholder or beneficial owner that constitute such person's ''net long position'' as defined in Rule 14e–4 under the Act, provided that (A) for the purposes of this definition, references in the rule to ''the date the tender offer is first publicly announced or otherwise made known by the bidder to the holders of the security to be acquired'' shall be the date of the relevant Special Meeting Request and all dates in the one year period prior thereto, the ''highest tender offer price or stated amount of the consideration offered for the subject security'' shall refer to the closing sales price of NASDAQ OMX's capital stock on NASDAQ on such date (or, if such date is not a trading day, the next succeeding trading day), the ''person whose securities are the subject of the offer'' shall refer to NASDAQ OMX, a ''subject security'' shall refer to the issued and outstanding voting stock of NASDAQ OMX; and (B) the net long position of such stockholder shall be reduced by any shares as to which such person does not have the right to vote or direct the vote at the proposed special meeting or as to which such person has entered into a derivative or other agreement, arrangement or understanding that hedges or transfers, in whole or in part, directly or indirectly, any of the economic consequences of ownership of such shares. In addition, to the extent any affiliates of the stockholder or beneficial owner are acting in concert with the stockholder or beneficial owner with respect to the calling of the special meeting, the determination of Net Long Shares may include the effect of aggregating the Net Long Shares (including any negative number) of such affiliate or affiliates. *See* proposed Section 3.2(a) of the By-Laws.

[15] Under proposed Section 3.2(b) of the By-Laws, the election of directors shall be deemed a ''Similar Item'' with respect to all items of business involving the nomination, election or removal of directors.

[16] *See* proposed Section 3.2(a) of the By-Laws.

[17] *Id.*

- Be in writing, signed by each Requesting Person [18] and delivered to NASDAQ OMX's Corporate Secretary at NASDAQ OMX's principal executive offices;
- set forth certain information with respect to (i) each person the Requesting Person proposes to nominate for director, (ii) any business the Requesting Person proposes to bring before the meeting and (iii) each Requesting Person; [19] and
- include (i) an agreement by each Requisite Holder to immediately deliver written notice to NASDAQ OMX's Corporate Secretary in the case of any disposition, on or prior to the record date for the special meeting, of any shares of NASDAQ OMX's capital stock held of record by such Requisite Holder and (ii) an acknowledgement that (1) any such disposition shall be deemed a revocation of the Special Meeting Request to the extent of such disposition and (2) if, following such deemed revocation, the Requisite Holders hold of record, in the aggregate, less than the Requisite Percentage of the voting power of all outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors, NASDAQ OMX shall have no obligation to hold the special meeting.

Proposed Section 3.2(f) provides that at any special meeting of the stockholders, the only business to be conducted or considered will have been specified in the notice of meeting (or any supplement thereto) given by or at the direction of NASDAQ OMX's Board or Corporate Secretary, as the case may be. In any event, however, NASDAQ OMX's Board may submit its own proposal or proposals for consideration at a special meeting. Except as otherwise allowed under proposed Section 3.2, stockholders will not be permitted to propose business to be brought before a special meeting of the stockholders. NASDAQ OMX believes these provisions are reasonable and necessary to limit the items of business that may be considered at a special meeting to those that were proposed by the Company, the Board or stockholders that comply with the requirements and procedures set forth in the By-Laws.

Proposed Section 3.2(g) will require the Requisite Holders giving a Special Meeting Request to further update and supplement the request, if necessary, so that the information in the request is true and correct as of the record date for the special meeting and as of the 10th business day prior to the special meeting or any adjournment or postponement thereof. This requirement will ensure that NASDAQ OMX, its Board and its other stockholders are notified of changes to the information they will consider in assessing a proposed item of business prior to the special meeting. In the case of an update and supplement required to be made as of the record date, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the fifth business day after the record date for the special meeting. In the case of an update and supplement required to be made as of the 10th business day prior to the special meeting or any adjournment or postponement thereof, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the eighth business day prior to the date for the special meeting or, if practical, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the special meeting has been adjourned or postponed).

Proposed Section 3.2(h) will allow the Requisite Holders to revoke a Special Meeting Request by written revocation delivered to NASDAQ OMX at any time prior to the special meeting requested. However, NASDAQ OMX's Board will have the discretion to determine whether or not to proceed with the special meeting. The Board might wish to continue with the special meeting if, for example, the Company has already spent the time and expense required to call the meeting or if the agenda for the meeting includes items other than those proposed in the Special Meeting Request.

Finally, NASDAQ OMX proposes to designate as Section 3.2(i) existing text that sets forth the requirements for stockholders to submit nominees for election as directors at certain stockholder meetings. NASDAQ OMX further proposes to make a minor change to this text to clarify that NASDAQ OMX's Board, rather than the Company itself, will call a special meeting on behalf of the Company.

(b) Annual Meetings of Stockholders

Section 3.1 of NASDAQ OMX's By-Laws, which is the ''advance notice'' provision,[20] requires stockholders to notify NASDAQ OMX, during a specified period in advance of an annual meeting, of their intention to nominate one or more persons for election to the Board or to present a business proposal for consideration by the stockholders at the meeting. While designing the proposed procedural requirements for stockholders to call a special meeting, as outlined above, NASDAQ OMX evaluated the existing procedural requirements for stockholders to bring business before an annual meeting. NASDAQ OMX is therefore proposing changes to some of these procedures to enhance them and conform them, in some cases, to the procedures relating to special meetings. Generally, the proposed amendments add requirements for extensive disclosures by proposing stockholders about themselves, any proposed nominees for director and any proposed items of business to be brought before a meeting. The specific amendments are discussed in detail below.

First, Section 3.1(a) of the By-Laws currently states that nominations of persons for election to NASDAQ OMX's Board and the proposal of other business to be considered by the stockholders at an annual meeting of stockholders may be made only: (i) Pursuant to the Company's notice of meeting (or any supplement thereto); (ii) by or at the direction of NASDAQ OMX's Board or its Nominating & Governance Committee; or (iii) by any stockholder of the Company that meets certain requirements. These requirements state that the stockholder must: (i) Be a stockholder of record at the time of delivery of notice to the Company of nominees or other business to be conducted at the meeting; (ii) be entitled to vote at the meeting; and (iii) comply with the notice procedures set forth in the By-Laws. NASDAQ OMX proposes to add a parenthetical to the requirement that a stockholder must be a stockholder of record to clarify that a nomination or proposal of other business may be made on behalf of a beneficial owner, if different from the stockholder of record, only if the beneficial owner is the beneficial owner of NASDAQ OMX shares. This modification will clarify that both

[18] ''Requesting Person'' means (i) each Requisite Holder, (ii) the beneficial owner or beneficial owners, if different, on whose behalf the Special Meeting Request is being delivered to NASDAQ OMX's Corporate Secretary and (iii) any affiliate or associate of such stockholder or beneficial owner. *See* proposed Section 3.2(e) of the By-Laws.

[19] The information required is the same information required from Proposing Persons with respect to nominations or items of business to be brought before an annual meeting of stockholders and is described in detail in Section (iv)(b) below.

[20] ''Advance notice'' provisions allow stockholder(s) to bring business before an annual meeting of stockholders, but set forth procedural requirements to ensure that companies and boards have sufficient information about the proposal and the proposing stockholder(s), as well as adequate time to consider the proposal, by requiring the proposing stockholder(s) to give advance notice of the intention to bring the proposal before the annual meeting.

record and beneficial owners of NASDAQ OMX stock have the right to propose nominees or business to be considered at an annual meeting. NASDAQ OMX further proposes that a stockholder who proposes nominees or business to be considered at an annual meeting must hold shares in the Company at the time of the meeting, in addition to the time of delivery of the required notice to the Company. This will ensure that a stockholder retains an interest in the Company until the meeting at which the stockholder's nominee or other business is considered. Finally, NASDAQ OMX proposes to number the procedural requirements for stockholders who propose nominees or business to make them easier to understand.

Currently, Section 3.1(b) of the By-Laws sets forth the requirements for a stockholder's notice to NASDAQ OMX of nominations or other business to be considered at an annual meeting. NASDAQ OMX proposes certain amendments to this section to ensure that NASDAQ OMX has sufficient information about such nominations or other business proposed by a stockholder to enable the Company, the Board and the other stockholders to assess a position on the nominations or other business. The additional information requirements will also ensure that NASDAQ OMX can make adequate disclosures to its stockholders and comply with requirements under applicable law.

Specifically, NASDAQ OMX proposes an amendment to the first paragraph of this section to require a stockholder who provides a notice relating to a nomination to include with the notice, a completed and signed questionnaire, representation and agreement relating to the nominee(s) for director.[21] NASDAQ OMX also proposes to require a stockholder who provides a notice to further update and supplement the notice, if necessary, so that the information in the notice is true and correct as of the record date for the annual meeting and as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof.[22] This requirement will ensure that NASDAQ OMX, its Board and its other stockholders are notified of changes to the information they will consider in assessing a proposed item of business prior to the annual meeting. In the case of an update and supplement required to be made as of the record date, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the fifth business day after the record date for the annual meeting. In the case of an update and supplement required to be made as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof, the update and supplement must be delivered to NASDAQ OMX's Corporate Secretary no later than the eighth business day prior to the date for the annual meeting or, if practicable, any adjournment or postponement thereof (and, if not practicable, on the first practicable date prior to the date to which the annual meeting has been adjourned or postponed).

Section 3.1(b)(i) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ OMX about each person whom the stockholder proposes to nominate for election as a director. NASDAQ OMX proposes changes to this section to use the defined term ''Proposing Person'' instead of stockholder,[23] to require information with respect to nominees for reelection as well as nominees for election, to correct a reference to the Act and to add numbering and other organizational changes to make the requirements easier to read and understand. NASDAQ OMX also proposes to require the same information with respect to a proposed nominee that will be required with respect to a Proposing Person, as discussed further below. In addition, NASDAQ OMX proposes to add two new informational requirements for proposed nominees, including:

• A description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships, between or among any Proposing Person, on the one hand, and such proposed nominee and any of his or her respective affiliates and associates, on the other hand, including, without limitation, all information that would be required to be disclosed pursuant to Item 404 under Regulation S–K if such Requesting Person were the ''registrant'' for purposes of such rule and the proposed nominee were a director or executive officer of such registrant; and

• a completed and signed questionnaire, representation and agreement.[24]

Finally, NASDAQ OMX proposes to add a catch-all provision to Section 3.1(b)(i) of the By-Laws that will allow the Company to require any proposed nominee to furnish such other information (i) as the Company may reasonably require to determine the eligibility of such proposed nominee to serve as a director or (ii) that could be material to a reasonable stockholder's understanding of the independence, or lack of independence, of such proposed nominee. NASDAQ OMX believes that all of the new information requirements included in proposed Section 3.1(b)(i) are reasonable and necessary in order to assist the Company in evaluating director eligibility, independence and potential conflicts of interest.

Section 3.1(b)(ii) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ OMX about any business, other than nominations for director, that the stockholder proposes to bring before an annual meeting. NASDAQ OMX proposes changes to this section to require that the description of the proposed business be reasonably detailed, to use the defined term ''Proposing Person'' instead of stockholder and beneficial owner in certain places and to add numbering, reordering and other organizational changes to make the requirements easier to read and understand. NASDAQ OMX also proposes to add a new requirement for a stockholder to provide a reasonably detailed description of all contracts, agreements, arrangements and understandings between or among any of the Proposing Persons or between or among any Proposing Person in connection with the proposal. NASDAQ OMX believes this information will be useful in assessing the aims and incentives of Proposing Persons in proposing business before an annual meeting.

Section 3.1(b)(iii) of the By-Laws currently sets forth the information that a stockholder who proposes nominee(s) for director or other business to be put forth before an annual meeting must

[21] The contents of and rationale for the questionnaire, representation and agreement are discussed further in Section (iv)(c) below.

[22] NASDAQ OMX notes that this proposal is similar to proposed Section 3.2(g) of the By-Laws, which requires updates and supplements to a stockholder notice relating to a special meeting. This proposed change is discussed further in Section (iv)(a) above.

[23] ''Proposing Person'' means (i) the stockholder providing the notice of business or the notice of the nomination, as applicable, proposed to be brought before an annual meeting, (ii) any beneficial owner or beneficial owners, if different, on whose behalf such business is proposed to be brought before the meeting or the notice of the nomination proposed to be made at the meeting is made, as applicable, and (iii) any affiliate or associate (each within the meaning of Rule 12b–2 under the Act for purposes of the By-Laws) of such stockholder or beneficial owner. *See* proposed Section 3.1(c) of the By-Laws.

[24] The contents of and rationale for the questionnaire, representation and agreement are discussed further in Section (iv)(c) below.

provide to NASDAQ OMX about such stockholder and the beneficial owner, if any, on whose behalf the nomination or proposal is made. NASDAQ OMX proposes changes to this section to use the defined term ''Proposing Person'' instead of stockholder and beneficial owner in certain places and to add numbering, reordering and other organizational changes to make the requirements easier to read and understand.

Relating to the existing requirement in Section 3.1(b)(iii)(B) that a proposing stockholder describe the class or series and number of shares of NASDAQ OMX capital stock owned beneficially and of record by such stockholder and the beneficial owner, NASDAQ OMX proposes to add a parenthetical stating that beneficial ownership shall be determined within the meaning of Rule 13d–3 under the Act. NASDAQ OMX also proposes to state that a Proposing Person shall in all events be deemed to beneficially own any shares of any class or series of NASDAQ OMX's capital stock as to which such person has a right to acquire beneficial ownership at any time in the future. These proposed changes merely clarify how the concept of beneficial ownership will be interpreted under this section of the By-Laws.

Current Section 3.1(b)(iii)(D) requires proposing stockholders to describe to NASDAQ OMX any agreement, arrangement or understanding (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares) that has been entered into as of the date of the notice by the stockholder and the beneficial owners with respect to NASDAQ OMX's stock. Given the increased complexity of such transactions in today's marketplace, NASDAQ OMX proposes to replace the current language with a similar requirement for disclosure of any Synthetic Equity Interest,[25] without regard to whether: (i) the derivative, swap or other transaction or series of transactions conveys any voting rights in such shares to the Proposing Person; (ii) the derivative, swap or other transaction or series of transactions is required to be, or is capable of being, settled through delivery of such shares; or (iii) the Proposing Person may have entered into other transactions that hedge or mitigate the economic effect of such derivative, swap or other transaction or series of transactions. This proposed provision will assist NASDAQ OMX, its Board and its other stockholders in understanding a Proposing Person's full economic interests in NASDAQ OMX and possible aims and incentives in submitting the proposed business for consideration at an annual meeting.

For this same reason, NASDAQ OMX also proposes to add several new disclosures that a Proposing Person must include in a notice to NASDAQ OMX regarding nominees or other business to be conducted at an annual meeting. These include disclosures regarding:

- Any proxy (other than a revocable proxy or consent given in response to a solicitation made pursuant to, and in accordance with, Section 14(a) of the Act by way of a solicitation statement filed on Schedule 14A), agreement, arrangement, understanding or relationship pursuant to which the Proposing Person has or shares a right to vote any shares of any class or series of NASDAQ OMX;[26]
- any proportionate interest in NASDAQ OMX shares or Synthetic Equity Interest held, directly or indirectly, by a general or limited partnership in which the Proposing Person is a general partner or, directly or indirectly, beneficially owns an interest in a general partner;[27]
- any agreement, arrangement, understanding or relationship, including any repurchase or similar so-called ''stock borrowing'' agreement or arrangement, entered into or engaged in, directly or indirectly, by the Proposing Person, the purpose or effect of which is to mitigate loss to, reduce the economic risk (of ownership or otherwise) of shares of any class or series of NASDAQ OMX by, manage the risk of share price changes for, or increase or decrease the voting power of, the Proposing Person with respect to shares of any class or series of NASDAQ OMX, or that provides, directly or indirectly, the opportunity to profit from any decrease in the price or value of shares of any class or series of NASDAQ OMX (any of the foregoing, a ''Short Interest'');[28]
- any performance-related fees (other than an asset-based fee) to which the Proposing Person is entitled based on any increase or decrease in the price or value of shares of any class or series of NASDAQ OMX, or any Synthetic Equity Interest or Short Interest;[29]
- any significant equity interest or any Synthetic Equity Interest or Short Interest in any principal competitor of NASDAQ OMX held by the Proposing Person;[30]
- any direct or indirect interest of the Proposing Person in any contract with NASDAQ OMX, any affiliate of NASDAQ OMX or any principal competitor of NASDAQ OMX (including, in any such case, any employment agreement, collective bargaining agreement or consulting agreement);[31]
- any pending or threatened litigation in which the Proposing Person is a party or material participant involving NASDAQ OMX or any of its officers or directors, or any affiliate of NASDAQ OMX;[32]
- any material transaction occurring, in whole or in part, during the then immediately preceding 12-month period between such Proposing Person, on the one hand, and NASDAQ OMX, any affiliate of NASDAQ OMX or any principal competitor of NASDAQ OMX, on the other hand;[33] and
- any other information relating to the Proposing Person required to be disclosed in a proxy statement or other filings required to be made in connection with solicitations of proxies for, as applicable, the proposal and/or for the election of directors in an election contest pursuant to and in accordance with Section 14(a) of the Act and the rules and regulations promulgated thereunder.[34]

[25] ''Synthetic Equity Interest'' shall mean any derivative, swap or other transaction (including any short positions, profit interest, options, warrants, convertible securities, stock appreciation or similar rights) or series of transactions engaged in, directly or indirectly, by a Proposing Person, the purpose or effect of which is to give the Proposing Person economic risk similar to ownership of shares of any class or series of NASDAQ OMX, including due to the fact that the value of such derivative, swap or other transaction or series of transactions is determined by reference to the price, value or volatility of any shares of any class or series of NASDAQ OMX, or which derivative, swap or other transaction or series of transactions provides, directly or indirectly, the opportunity to profit from any increase in the price or value of shares of any class or series of NASDAQ OMX. *See* proposed Section 3.1(b)(iii)(D) of the By-Laws.

[26] *See* proposed Section 3.1(b)(iii)(E) of the By-Laws.

[27] *See* proposed Section 3.1(b)(iii)(F) of the By-Laws.

[28] *See* proposed Section 3.1(b)(iii)(G) of the By-Laws.

[29] *See* proposed Section 3.1(b)(iii)(H) of the By-Laws.

[30] *See* proposed Section 3.1(b)(iii)(I) of the By-Laws.

[31] *See* proposed Section 3.1(b)(iii)(J) of the By-Laws.

[32] *See* proposed Section 3.1(b)(iii)(K) of the By-Laws.

[33] *See* proposed Section 3.1(b)(iii)(L) of the By-Laws.

[34] *See* proposed Section 3.1(b)(iii)(M) of the By-Laws. NASDAQ OMX also proposes to include an exception to each of the aforementioned disclosure requirements for any disclosures with respect to the ordinary course business activities of any broker, dealer, commercial bank, trust company or other nominee who is a Proposing Person solely as a

(c) Questionnaire, Representation and Agreement for Director-Nominees

NASDAQ OMX proposes to add a new Section 3.5 to its By-Laws to require nominees for director to deliver to NASDAQ OMX, in accordance with the time periods prescribed for delivery of a stockholder's notice: (i) A written questionnaire with respect to the background and qualifications of the nominee; and (ii) a written representation and agreement as to certain matters. Specifically, the written representation and agreement will provide that the nominee:

- Is not and will not become a party to (i) any agreement as to how the nominee will act or vote on any issue or question (a ''Voting Commitment'') that has not been fully disclosed to NASDAQ OMX or (ii) any Voting Commitment that could limit or interfere with the nominee's fiduciary duties under applicable law;
- is not and will not become a party to any agreement with any person other than NASDAQ OMX with respect to any direct or indirect compensation, reimbursement or indemnification in connection with service or action as a director of NASDAQ OMX that has not been fully disclosed to NASDAQ OMX;
- would be in compliance, if elected, and will comply, with the provisions of NASDAQ OMX's By-Laws relating to qualifications of directors, conflicts of interest and contracts and transactions involving directors; and
- in such proposed nominee's individual capacity and on behalf of any person on whose behalf the nomination is made, would be in compliance, if elected, and will comply, with NASDAQ OMX's Corporate Governance Guidelines, Board of Director Code of Conduct and Code of Ethics, including all applicable, publicly disclosed conflict of interest, confidentiality, stock ownership and insider trading policies and guidelines.

The requirements of proposed Section 3.5 of the By-Laws, which will apply to both the Company's and stockholders' nominees for director, will ensure that NASDAQ OMX has the necessary information about nominees to fulfill its public disclosure requirements. The requirements also will ensure that nominees will comply with the legal obligations, policies and procedures applicable to all NASDAQ OMX directors.

result of being the stockholder directed to prepare and submit the notice required by the By-Laws on behalf of a beneficial owner.

(d) Removal and Replacement of Supermajority Voting Provisions

Consistent with the proposed amendments to remove and replace the supermajority voting provisions in the Charter discussed above, NASDAQ OMX proposes to amend each provision of the By-Laws that currently requires a supermajority vote of stockholders to instead require a ''majority of votes outstanding.'' NASDAQ OMX's By-Laws currently include the following two supermajority voting requirements, each of which conforms with an analogous provision in the Charter.

- *Removal of Directors.* Section 4.6 provides that any or all of the directors may be removed from office at any time by the affirmative vote of at least 66⅔% of the total voting power of the Voting Stock, voting together as a single class.[35]
- *Adoption, Alteration, Amendment and Repeal of By-Laws.* Section 11.1 provides that the By-Laws may be altered amended or repealed, or new By-Laws may be adopted, at any meeting of the stockholders by the affirmative vote of the holders of at least 66⅔% of the voting power of the Voting Stock, voting together as a single class.[36]

To conform with the proposed changes to the Charter, NASDAQ OMX proposes to replace each of these supermajority voting requirements with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock. As discussed above with respect to the analogous Charter amendments, NASDAQ OMX believes that a ''majority of outstanding shares'' standard reflects a balanced approach that responds to stockholder feedback while appropriately maintaining NASDAQ OMX's defensive posture against hostile takeovers.

(e) Procedures for Filling Board Vacancies

Section 4.8 of the By-Laws sets forth the procedures to fill a director position that has become vacant, whether because of death, disability, disqualification, removal or resignation. Under the current provisions, if such a vacancy occurs, the Nominating & Governance Committee of the Board shall nominate, and the Board shall elect by majority vote, a person to fill the vacancy. In light of the addition of a right for stockholders to call a special meeting, as discussed above, NASDAQ OMX proposes amendments to Section 4.8 to state explicitly that vacancies on the Board are to be filled by a majority vote of the Board, and not by stockholders. In addition, to prescribe procedures in case multiple Board vacancies occur at the same time, the proposed amendments state that a Board vacancy shall be filled by the majority of the directors, even if there is less than a quorum, or by the sole remaining director, if there is only one director remaining on the Board. The proposed amendments do not change any of the other procedures for filling Board vacancies.

[35] This provision is analogous to Article Fifth, Paragraph D of the Charter, which is discussed under Section (ii)(a) above.

[36] This provision is analogous to Article Eighth, Paragraph A of the Charter, which is discussed under Section (ii)(a) above.

(f) Use of Electronic Means for Certain Notices and Related Waivers

Currently, Section 4.12(a) of the By-Laws provides that notice of any meeting of the Board shall be deemed duly given to a director if, among other methods, the notice is sent to the director at the address last made known in writing to NASDAQ OMX by telegraph, telefax, cable, radio or wireless. Section 4.12(b) of the By-Laws provides that such notice of a board meeting need not be given to any director if waived by the director in writing or by electronic transmission (or by telegram, telefax, cable, radio or wireless and subsequently confirmed in writing or by electronic transmission). NASDAQ OMX proposes amendments to Sections 4.12(a) and (b) to provide that both notices and waivers of such notices can be given by email or other means of written electronic transmission. These amendments are intended merely to expand the means through which notices and waivers of notices may be given, and the amendments do not affect any of the other procedural requirements of Sections 4.12(a) and (b). In addition, the proposed amendments reflect current practices, as a substantial amount of communications between NASDAQ OMX and its directors, outside of Board meetings, occurs through electronic means.

(g) Composition of the Management Compensation Committee

As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act and Rule 10C–1 under the Exchange Act,[37] NASDAQ recently amended its listing rules relating to compensation committees.[38] Since NASDAQ OMX is

[37] *See* Public Law 111–203, 124 Stat. 1376 (2010) and 17 CFR 240.10C–1.

[38] *See* Securities Exchange Act Release No. 68640 (January 11, 2013), 78 FR 4554 (January 22, 2013) (SR–NASDAQ–2012–109). Among other things, the amendments require each NASDAQ-listed company, with certain exceptions, to have a

Continued

listed on NASDAQ, it must comply with these listing rules just like any other listed company. NASDAQ OMX therefore proposes amendments to Section 4.13(f) of the By-Laws, which relates to the composition of the Management Compensation Committee of NASDAQ OMX's Board, to conform to the recent amendments to NASDAQ's listing rules. Specifically, NASDAQ OMX proposes to state that the Management Compensation Committee must consist of at least two members and that each member shall meet the eligibility requirements set forth in the rules of The NASDAQ Stock Market.

(h) No Amendment or Repeal of Certain By-Law Amendments

While current Section 11.1 of the By-Laws provides for alteration, amendment, repeal and adoption of By-Laws by the stockholders, current Section 11.2 provides for alteration, amendment, repeal and adoption of By-Laws by the Board. These two sections operate as alternate means to alter, amend, repeal or adopt By-Laws. In other words, the stockholders may alter, amend, repeal or adopt By-Laws without any action by the Board, and vice versa. NASDAQ OMX proposes to add a proviso to Section 11.2 to state that no By-Law adopted by the stockholders shall be amended or repealed by the Board if the By-Law so adopted so provides. This is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholder action to amend or repeal the By-Laws.

(i) Non-Substantive Changes

The remaining proposed By-Law amendments are non-substantive changes, which will simplify and streamline the document. Specifically, NASDAQ OMX proposes minor changes to Section 3.3 to incorporate the new defined term ''Proposing Person,'' to use the term ''nomination'' rather than ''nominee'' for consistency and to correct two cross-references. NASDAQ OMX also proposes to delete obsolete references to the 3.75% Series A Convertible Notes due 2012 and the Series B Convertible Notes due 2012, which are no longer outstanding, in Section 12.7.

In addition, NASDAQ OMX proposes to correct typographical errors and/or delete obsolete cross-references in Article I(f), Section 4.3, Section 9.4(b), Section 12.5 and Section 12.6. Finally, NASDAQ OMX proposes to renumber and reorganize the provisions of the By-Laws, where necessary following the other amendments.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[39] in general, and furthers the objectives of Section 6(b)(5) of the Act,[40] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

In response to feedback from its investors, NASDAQ OMX is proposing changes to its Charter to replace each supermajority voting requirement with a ''majority of outstanding shares'' voting standard. NASDAQ OMX believes this approach will strike an appropriate balance between responding to stockholder feedback and protecting the Company and its investors against hostile takeovers. In addition, the clarifying changes to the Charter will protect investors by making the Charter more concise and easier to understand. Both sets of changes to the Charter were approved by NASDAQ OMX's investors at the most recent annual meeting of stockholders.

NASDAQ OMX also proposes to eliminate the Certificate of Designation relating to the Series A Convertible Preferred Stock, which is no longer outstanding. This proposed change will protect investors by enhancing the clarity of NASDAQ OMX's Charter.

Finally, NASDAQ OMX proposes changes to its By-Laws: (i) To implement a stockholder right to call a special meeting; (ii) to enhance the ''advance notice'' procedures; (iii) to require certain information and agreements from director-nominees; (iv) to remove and replace the supermajority voting provisions to conform to the Charter amendments; (v) to clarify the procedures for filling Board vacancies; (vi) to allow the use of electronic means for certain notices and waivers; (vii) to conform the composition requirements for the Management Compensation Committee of NASDAQ OMX's Board with the NASDAQ listing rules; (vii) [sic] to prevent the Board from amending or repealing By-Law amendments approved by the stockholders; and (viii) [sic] to make other non-substantive changes.

The proposals relating to the stockholder right to call a special meeting and to remove and replace the supermajority voting requirements are responsive to feedback from NASDAQ OMX's stockholders. The additional procedural requirements relating to special and annual meetings will protect investors by stating clearly and explicitly the procedures stockholders must follow to propose business at such meetings. The requirement for certain information and agreements from director-nominees will enhance investor protection by ensuring that nominees provide adequate information about themselves and also comply with applicable law and certain NASDAQ OMX policies and procedures relating to the Board. The prohibition on the Board amending or repealing By-Law amendments approved by the stockholders is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholders' wishes. Finally, the remaining changes are clarifying in nature, and they enhance investor protection by conforming NASDAQ OMX's governance documents to current practices and applicable rules and by making them clearer and easier to understand.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of NASDAQ OMX and not to the operations of the Exchange, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

compensation committee of its board of directors, consisting of a minimum of two independent directors who meet additional eligibility requirements relating to compensatory fees and affiliation.

[39] 15 U.S.C. 78f(b).

[40] 15 U.S.C. 78f(b)(5).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2013–115 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2013–115. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2013–115, and should be submitted on or before January 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–29609 Filed 12–11–13; 8:45 am]

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[41] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71018]

Order Granting a Temporary Exemption Pursuant to Section 36(a)(1) of the Securities Exchange Act of 1934 From the Filing Deadline Specified in Rule 613(a)(1) of the Exchange Act

December 6, 2013.

Rule 613(a)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] requires the Financial Industry Regulatory Authority, Inc. (''FINRA'') and the eighteen registered national securities exchanges (collectively, the ''SROs'') to ''jointly file on or before 270 days from the date of publication of the Adopting Release [for Rule 613 of the Exchange Act[2]] in the **Federal Register** a national market system plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository as required by [the rule].'' The Adopting Release for Rule 613 was published in the **Federal Register** on August 1, 2012,[3] thus requiring the national market system plan (''NMS plan'') to be filed on or before April 28, 2013.[4] On March 7, 2013, the Securities and Exchange Commission (''Commission'') granted a request from the SROs for a temporary exemption from this deadline until December 6, 2013.[5] On November 8, 2013, the SROs filed an application, pursuant to Rule 0–12 under the Exchange Act,[6] to request the Commission to grant a temporary exemption under Section 36 of the Exchange Act,[7] from the deadline specified in Rule 613(a)(1) of the Exchange Act[8] for submitting the NMS plan to the Commission until September 30, 2014.[9]

In their Current Request Letter, the SROs explain that on February 26, 2013, they published a Request for Proposal (''RFP'') to solicit bids from which they will select an entity to serve as the consolidated audit trail (''CAT'') plan processor to build, operate, administer, and maintain the CAT.[10] Thirty-one firms, including four distinct SRO groups, initially indicated that they planned to submit bids on the RFP.[11] The SROs further state in the Current Request Letter that following the publication of the RFP, potential bidders and members of the public, including broker-dealer members of the SROs, expressed interest in the process by which the SROs will review and evaluate bids, narrow down the list of bids, use those bids in formulating the CAT NMS Plan, and, ultimately, select the CAT plan processor.

The SROs state in the Current Request Letter that they solicited views from potential bidders regarding whether they preferred to know the process the SROs will follow to review, evaluate, and select a bidder in advance of submitting their bids and whether that process could influence either a decision regarding whether to submit a bid or the contents of a bid. The SROs represent that many potential bidders indicated that knowing the process by which the SROs will choose the plan processor is important to finalizing their bids. According to the SROs, the potential bidders also generally expressed the view that providing bidders with four weeks between approval of a selection process and the submission deadline for the bids would be an appropriate timeframe to allow bidders to make any changes to their bids in light of the approved evaluation and selection process. Based on this

[1] 17 CFR 242.613(a)(1).

[2] 17 CFR 242.613.

[3] Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012) (''Adopting Release'').

[4] April 28, 2013, was a Sunday. Therefore, in accordance with Rule 160(a) of the Commission Rules of Practice, the deadline for filing the NMS plan was Monday, April 29, 2013.

[5] *See* Securities Exchange Act Release No. 69060, 78 FR 15771 (March 12, 2013); and letter from Robert L.D. Colby, Executive Vice President and Chief Legal Officer, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated February 7, 2013 (''February 7, 2013 Letter'').

[6] 17 CFR 240.0–12.

[7] 15 U.S.C. 78mm.

[8] 17 CFR 242.613(a)(1).

[9] *See* Letter from Robert L.D. Colby, Executive Vice President and Chief Legal Officer, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated November 7, 2013 (the ''Current Request Letter'').

[10] In the February 7, 2013 Letter, the SROs stated that an RFP process was necessary prior to filing an NMS plan pursuant to Rule 613 (''CAT NMS Plan''). The SROs explained their belief that such a process would ensure that potential alternative solutions for creating the consolidated audit trail could be presented to the SROs for their consideration, and would provide the SROs with information necessary to prepare a detailed cost/benefit analysis as required by Rule 613. *See* February 7, 2013 Letter, *supra* note 5.

[11] According to the SROs, since that time, seven firms have formally notified the SROs of their intent to withdraw as primary bidders. *See* Current Request Letter, *supra* note 9. Of the seven firms that formally notified the SROs of their intent to withdraw as primary bidders, two are SRO groups. *See http://catnmsplan.com/web/groups/catnms/@catnms/documents/appsupportdocs/p217583.pdf* (last visited November 19, 2013).

feedback, the SROs filed with the Commission an NMS plan to govern the SROs' process for the selection of a CAT plan processor, and for mitigating conflicts of interest that might arise in the process (the ''Selection NMS Plan'').[12]

In the Current Request Letter, the SROs state that a temporary exemption is necessary and appropriate regardless of whether the Commission approves the Selection NMS Plan. Specifically, the SROs note that if the Selection NMS Plan is approved, they believe it will take ''approximately seven months from the receipt of the bids to review and evaluate the bids, perform the in-depth and thorough analysis . . . required by Rule 613, and draft the CAT NMS plan for submission to the SEC.'' [13] The SROs further state that ''[b]ecause the content of the bids is critical to the analysis needed to draft the CAT NMS Plan, the SROs estimate that seven months following the receipt of bids is necessary to ensure that they can fully address the considerations enumerated in Rule 613, including a discussion of the costs and benefits of not only the proposed solution(s) but also of the alternative solutions considered but not proposed as the solution in the CAT NMS Plan, so that the Commission and the public have sufficiently detailed information to carefully consider all aspects of the CAT NMS Plan ultimately submitted by the SROs.'' [14] If the Selection NMS Plan is not approved, the SROs explain that they will need the temporary exemption to allow bidders additional time to finalize their bids, and allow the SROs additional time to develop an alternative process for evaluating the bids, developing the CAT NMS Plan, and selecting the CAT plan processor.[15]

Section 36 of the Exchange Act [16] authorizes the Commission, by rule, regulation, or order, to exempt, either conditionally or unconditionally, any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

The Commission finds that it is appropriate in the public interest, and is consistent with the protection of investors, to grant the SROs a temporary exemption from the deadline for filing the CAT NMS Plan contained in Rule 613(a)(1) until September 30, 2014. The Commission believes that granting the exemption is appropriate in light of the need for the SROs to establish a deadline for finalizing and submitting bids in response to the RFP; to evaluate the bids submitted and select the CAT Plan Processor under the Selection NMS Plan, if the Selection NMS Plan is approved by the Commission, or an alternative process if the Selection NMS Plan is not approved by the Commission; and to draft the CAT NMS Plan.

Accordingly, *it is hereby ordered,* pursuant to Section 36 of the Exchange Act,[17] that the SROs are temporarily exempted from the deadline for submitting the NMS plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository contained in Rule 613(a)(1) [18] until September 30, 2014.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–29620 Filed 12–11–13; 8:45 am]

BILLING CODE 8011–01–P

[12] The Commission published the Selection NMS Plan for notice and comment. *See* Securities Exchange Act Release No. 70892 (November 15, 2013), 78 FR 66910 (November 21, 2013).

[13] *See* Current Request Letter, *supra* note 9.

[14] *Id.*

[15] *Id.*

[16] 15 U.S.C. 78mm.

[17] 15 U.S.C. 78mm.

[18] 17 CFR 242.613(a)(1).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Advanced Qualification Program (AQP)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The Advanced Qualification Program uses data driven quality control processes for validating and maintaining the effectiveness of air carrier training program curriculum content.

DATES: Written comments should be submitted by February 10, 2014.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0701.

Title: Advanced Qualification Program (AQP).

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: Under Special Federal Aviation Regulation No. 58, Advanced Qualification Program (AQP), the FAA provides certificated air carriers, as well as training centers they employ, with a regulatory alternative for training, checking, qualifying, and certifying aircrew personnel subject to the requirements of 14 CFR parts 121 and 135. The main goal of the AQP is to improve flight crew performance by providing alternative means of complying with certain rules that may inhibit innovative use of modern technology for flight crewmember training. AQP is continuously validated through the collection and analysis of trainee performance. Data collection and analysis processes ensure that the certificate holder provides performance information on its crewmembers, flight instructors, and evaluators that will enable the certificate holder and the FAA to determine whether the form and content of training and evaluation activities are satisfactorily accomplishing the overall objectives of the curriculum.

Respondents: 18 respondents with approved Advanced Qualification Programs.

Frequency: Data is collected monthly.

Estimated Average Burden per Response: 2 hours.

Estimated Total Annual Burden: 432 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on December 6, 2013.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2013–29687 Filed 12–11–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: General Aviation and Air Taxi Activity and Avionics Survey

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. Respondents to this survey are owners of general aviation aircraft. This information is used by FAA, NTSB, and other government agencies, the aviation industry, and others for safety assessment, planning, forecasting, cost/benefit analysis, and to target areas for research.

DATES: Written comments should be submitted by February 10, 2014.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0060.

Title: General Aviation and Air Taxi Activity and Avionics Survey.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: Title 49, United States Code, empowers the Secretary of Transportation to collect and disseminate information relative to civil aeronautics, to study the possibilities for development of air commerce and the aeronautical industries, and to make long-range plans for, and formulate policy with respect to, the orderly development and use of the navigable airspace, radar installations and all other aids for air navigation. Respondents to this survey are owners of general aviation aircraft. This information is used by FAA, NTSB, and other government agencies, the aviation industry, and others for safety assessment, planning, forecasting, cost/benefit analysis, and to target areas for research.

Respondents: Approximately 83,500 owners of general aviation aircraft.

Frequency: Information is collected annually.

Estimated Average Burden per Response: 20 minutes.

Estimated Total Annual Burden: 13,000 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on December 6, 2013.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2013–29688 Filed 12–11–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of a New Approval of Information Collection: Information Regarding Ferry Flights in On-Demand Operations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a new information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 30, 2013, vol. 78, no. 169, pages 53817–53818. The collection involves an assessment of the number of ferry flights typically conducted by on-demand air carriers and the costs associated with those flights. The information to be collected will be used to conduct a benefit cost analysis in connection with rulemaking as required by Congress.

DATES: Written comments should be submitted by January 13, 2014.

FOR FURTHER INFORMATION CONTACT: Martin Zhu at (202) 267–4110 or by email at: *martin.zhu@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–XXXX.

Title: Information Regarding Ferry Flights in On-Demand Operations.

Form Numbers: There are no FAA forms associated with this specific collection of information.

Type of Review: Clearance of a new information collection.

Background: In response to the FAA Modernization and Reform Act of 2012 (Public Law 112–95), the FAA will initiate a rulemaking to change part 91 tail-end ferry flight limitations and rest requirements. The rule would apply part 135 flight limitations and rest requirements to today's part 91 tail-end ferry flights (a part 91 flight following the last part 135 flight in a duty period). The FAA will use the results of this collection of information as the basis for the cost and benefit estimate of the proposed rule. The FAA requests comments on the proposed questions below in order to help assess costs.

Survey Questions

1. How many total part 135 operations do you have annually?
2. For comparative purposes, how many aircraft are flown in your part 135 services?
3. How many tail-end ferry flights flown under part 91 would be curtailed if pilots need to fly under part 135 of rest and duty requirements?
4. What percentage of these tail-end ferry flights would be accounted as single-pilot flights?
5. Would another crewmember fly the aircraft to its destination?
6. What would be the average cost of tail-end ferries flown under part 91 rules?
7. What would be the average cost of tail-end ferries flown under part 135 rest and duty rules?
8. Please itemize key cost-drivers to comply with the proposed rule.

Respondents: Part 135 operators conducting part 91 tail-end ferry flight. We estimate 2,155 of part 135 operators have such operations.

Frequency: One time.

Estimated Average Burden per Response: 60 minutes.

Estimated Total One-Time Burden: 2,155 hours.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on December 6, 2013.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2013–29686 Filed 12–11–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2011–0294 (PD–35(R)]

New Jersey Regulations on Transportation of Regulated Medical Waste

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of administrative determination of preemption.

Applicable Federal Requirements: Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.,* and the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180.

Modes Affected: All transportation modes

SUMMARY: Federal hazardous material transportation law preempts the following requirements in the New Jersey Administrative Code (N.J.A.C.) because the requirements are not substantively the same as the requirements in the HMR:

1. N.J.A.C. 7:26–3A.10(a) that generators must separate into different containers before transport sharps, fluids (greater than 20 cc), and other regulated medical waste;
2. N.J.A.C. 7:26–3A.11(d) which allows a generator to ship oversized medical waste without placing it in a packaging as required by the HMR;
3. N.J.A.C. 7:26–3A.14 that the words ''Medical Waste'' or ''Infectious Waste'' must be labeled on the outside of the package when there is untreated regulated medical waste;
4. N.J.A.C. 7:26–3A:15 that each ''generator shall mark each individual container of regulated medical waste in accordance with all applicable Federal regulations. . . . ,'' and that the markings must include details of the transporter's name, the date of shipment, the intermediate handler's name, and other specific information;
5. N.J.A.C. 7:26–3A.19 and those provisions in 7:26–3A.31 which require the use of a specific ''tracking form'' to accompany shipments of regulated medical waste that are prescribed for either the generator or the transporter;
6. N.J.A.C. 7:26–3A.28 that, when transferring between transporters, each transporter must place a water resistant tag below the generator's marking on the outer surface of the container with the transporter's name, solid waste registration number, and date of receipt; and
7. N.J.A.C. 7:26–3A.30 which requires that a vehicle used to transport regulated medical waste must have: 1) the name of the transporter; 2) the New Jersey Department of Environmental Protection (NJDEP) solid waste transporter registration number; and 3) either the words ''Medical Waste'' or ''Infectious Waste'' on two sides and the back of the cargo-carrying body.
8. N.J.A.C. 7:26–3A.45, to the extent that it requires rail transporters to comply with the transporter requirements of 7:26–3A.28 and 7:26–3A.30.
9. N.J.A.C. 7:26–3A.46 which requires a specific tracking form to accompany shipments of regulated medical waste for rail transporters.

Federal hazardous material transportation law does not preempt the following requirements because they do not create an obstacle in complying with the HMR.

1. N.J.A.C. 7:26–3A.21(a)(1) to the extent that it requires the generator to retain a copy of the shipping paper for at least three years from the date the regulated medical waste was accepted by the transporter;
2. N.J.A.C. 7:26–3A.21(a)(2) to the extent that it requires the generator to retain a copy of any exception report for at least three years after the day the exception report was submitted;
3. N.J.A.C. 7:26–3A.22 to the extent that it requires the generator of regulated medical waste to file an exception report with the state when a transporter and/or destination facility notifies the generator of any discrepancy between the shipment as accepted by the initial transporter and delivered to the destination facility;
4. N.J.A.C. 7:26–3A.32 to the extent that it requires the transporter to deliver the entire quantity of regulated medical waste to the proper party listed on the tracking form;
5. N.J.A.C. 7:26–3A.33 to the extent that does not require a particular form to be used to consolidate the multiple shipments;
6. N.J.A.C. 7:26–3A.34 to the extent that it requires that the transporter of regulated medical waste to retain a copy of the shipping paper for at least three years from the date the regulated medical waste was accepted by the next party; and
7. N.J.A.C. 7:26–3A.41 to the extent that it requires intermediate handlers and destination facilities to certify that they had received the listed regulated medical waste.

FOR FURTHER INFORMATION CONTACT: Alisa Chunephisal, Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590–0001 (Tel. No. 202–366–4400).

SUPPLEMENTARY INFORMATION:

I. Application

The Healthcare Waste Institute (Institute) has applied to PHMSA for a determination whether Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.,* preempts requirements in the N.J.A.C. on the transportation of regulated medical waste in commerce regarding packaging, labeling and marking of containers, use of a specific ''tracking form,'' submission of ''exception reports,'' and marking of transport vehicles.

In summary, the Institute contends that these requirements are preempted because they are (1) not ''substantively the same as'' requirements in the

Federal hazardous material transportation law or the HMR, 49 CFR parts 171–180, on the transportation of regulated medical waste, or (2) otherwise an ''obstacle'' to accomplishing and carrying out Federal hazardous material transportation law and the HMR, as the NJDEP requirements are enforced and applied.

On November 10, 2011, PHMSA published a notice in the **Federal Register** inviting interested persons to comment on the Institute's application. 77 FR 39567. The only comment was submitted by the American Trucking Associations, Inc. (ATA). ATA echoes the position of the Institute that New Jersey's tracking form, marking, and labeling requirements fall within the ''enumerated 'covered subjects''' that ''requires that the state regulation be 'substantively the same as' the federal requirements.'' ATA also states that ''requiring different labels and marking for hazardous materials packagings and motor vehicles in transportation creates an unworkable situation [and] . . . motor carriers cannot be expected to modify package and vehicle markings and labels depending upon the states or municipalities they travel through.'' ATA opines that ''New Jersey's use of a unique hazardous materials shipping paper impacts safety by creating potential confusion for motor carriers and emergency responders. Moreover, the use of unique hazardous material shipping papers by states and municipalities creates a compliance nightmare for motor carriers.''

In a June 8, 2012 telephone conversation, staff attorneys in the New Jersey Department of Law and Public Safety advised an attorney in my office that the New Jersey regulations dated from 1989 when the U.S. Environmental Protection Agency (EPA) conducted a two-year demonstration program, which expired in 1991. *See* the discussion in Preemption Determination (PD) No. 23(RF), ''Morrisville, PA Requirements for Transportation of 'Dangerous Waste,' '' 66 FR 37260–61 (July 17, 2001), decision on petition for reconsideration, 67 FR 2948 (Jan. 22, 2002), and PD–29(R), ''Massachusetts Requirements on the Storage and Disposal of Infectious or Physically Dangerous Medical or Biological Waste,'' 69 FR 34715, 34717 (June 22, 2004). As explained in those decisions, DOT regulates the transportation of regulated medical waste as a Division 6.2 hazardous material. PD–23(RF), 66 FR at 37260–61; PD–29(R), 69 FR at 34717. *See also* 49 CFR 173.134(a)(5). However, New Jersey's regulations appear to treat regulated medical waste in a manner similar to hazardous waste subject to the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*

I. Federal Preemption

A United States Court of Appeals has found that uniformity was the ''linchpin'' in the design of the Federal laws governing the transportation of hazardous materials. *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d 1571, 1575 (10th Cir. 1991). Section 5125 of Title 49 U.S.C. contains express preemption provisions. Section 5125(a) provides that a requirement of a State, political subdivision of a State, or Indian tribe is preempted—unless the non-Federal requirement is authorized by another Federal law or DOT grants a waiver of preemption under § 5125(e)—if

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.[1]

Subsection (b)(1) of 49 U.S.C. 5125 further provides that a non-Federal requirement concerning any of the following subjects is preempted—unless authorized by another Federal law or DOT grants a waiver of preemption—when the non-Federal requirement is not ''substantively the same as'' a provision of Federal hazardous material transportation law, a regulation prescribed under that law, or a hazardous materials security regulation or directive issued by the Department of Homeland Security: [2]

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material.

Under 49 U.S.C. 5125(d)(1), any person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision or tribe may apply to the Secretary of Transportation for a determination whether the requirement is preempted. The Secretary of Transportation has delegated authority to PHMSA to make determinations of preemption, except for those concerning highway routing (which have been delegated to the Federal Motor Carrier Safety Administration). 49 CFR 1.53(b).

Section 5125(d)(1) requires notice of an application for a preemption determination to be published in the **Federal Register**. Following the receipt and consideration of written comments, PHMSA publishes its determination in the **Federal Register**. See 49 CFR 107.209(c).

Preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution, or statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law, or whether a fee is ''fair'' within the meaning of 49 U.S.C. 5125(f)(1). A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d at 1581.

In making preemption determinations under 49 U.S.C. 5125(d), PHMSA is guided by the principles and policies set forth in Executive Order No. 13132, entitled ''Federalism'' (64 FR 43255 (Aug. 10, 1999)), and the President's May 20, 2009 memorandum on ''Preemption'' (74 FR 24693 (May 22, 2009)). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other clear evidence Congress intended to preempt State law, or the exercise of State authority directly conflicts with

[1] These two paragraphs set forth the ''dual compliance'' and ''obstacle'' criteria which are based on U.S. Supreme Court decisions on preemption. *Hines* v. *Davidowitz,* 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963); *Ray* v. *Atlantic Richfield, Inc.,* 435 U.S. 151 (1978).

[2] To be ''substantively the same,'' the non-Federal requirement must conform ''in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted.'' 49 CFR 107.202(d). Additional standards apply to preemption of non-Federal requirements on highway routes over which hazardous materials may or may not be transported and fees related to transporting hazardous material. *See* 49 U.S.C. 5125(c) and (f).

the exercise of Federal authority. The President's May 20, 2009 memorandum sets forth the policy ''that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.'' Section 5125 contains express preemption provisions, which PHMSA has implemented through its regulations and which PHMSA applies in making administrative preemption determinations.

III. Discussion

A. Packaging and Segregation Requirements

The Institute raises concerns with two provisions which (1) allow generators to ship oversized medical waste without a packaging or container and (2) require generators to separate sharps, fluids (greater than 20 cc), and other regulated medical waste.

The HMR authorize the following packagings for the transportation of regulated medical waste: (1) UN standard non-bulk packagings conforming to the requirements of 49 CFR part 178 at the Packing Group II performance level; (2) large packagings constructed, tested, and marked in accordance with the requirements of part 178 provided the waste is contained in inner packagings conforming to the requirements of paragraph (e) of § 173.197; and (3) non-specification bulk packaging such as a wheeled cart or bulk outer packaging (BOP) provided the waste is contained in inner packagings conforming to the requirements of paragraph (e) of § 173.197. In addition, regulated medical waste transported by a private or contract carrier is excepted from the specific packaging requirements of § 173.197, if packaged in a rigid non-bulk packaging conforming to the general packaging requirements of §§ 173.24 and 173.24a and packaging requirements specified in 29 CFR 1910.1030, provided the material does not include a waste concentrated stock culture of an infectious substance. Sharps containers must be securely closed to prevent leaks or punctures. Thus, in all cases, the HMR require that, regardless of size, regulated medical waste may be transported only in a closed packaging or container.[3]

In comparison, New Jersey's regulations are less prescriptive than the HMR. First, N.J.A.C. 7:26–3A.5 defines ''oversized regulated medical waste'' as ''medical waste that is too large to be placed in a plastic bag or standard container,'' without defining the term ''standard container.'' More importantly, N.J.A.C. 7:26–3A.11(d) explicitly allows ''oversized regulated medical waste'' to be transported without any form of packaging or containment, in stark contrast to the authorized bulk packagings required in § 173.197.

The HMR also contain specific packaging requirements for sharps and liquids. 49 CFR 173.197(b) and (e)(3), respectively, provide that: ''A non-bulk packaging used as a sharps container must be puncture-resistant for sharps and sharps with residual fluid as demonstrated by conducting the performance tests in part 178. . . . Sharps containers must be securely closed to prevent leaks or puncture in conformance with the instructions provided by the packaging manufacturer.'' Moreover, ''[s]harps transported in a Large Packaging, Cart, or BOP must be packaged in a puncture-resistant inner packaging (sharps container).'' As for liquids, § 173.197(e)(2) requires that:

> Liquid regulated medical waste or clinical waste or (bio) medical waste transported in a Large Packaging, Cart, or BOP must be packaged in a rigid inner packaging conforming to the provisions of subpart B of this part. Liquid materials are not authorized for transportation in inner packagings having a capacity of greater than 19 L (5 gallons).

The HMR do not provide a quantity exception. In contrast, the N.J.A.C. 7:26–3A.10(a) ''requires generators to separate regulated medical waste into different containers before transport, i.e., sharps, fluids (greater than 20 cc), and other regulated medical waste.'' Moreover, N.J.A.C. 7.26–3A.11(d) provides that the packages or containers for sharps must be puncture resistant while the packages for fluids (quantities greater than 20 cubic centimeters) in packaging or containers must be break-resistant and tightly lidded or stoppered.

Because N.J.A.C. 7:26–3A.10(a) and N.J.A.C. 7:26–3A.11(d) cover ''the packing, repacking, [and] handling . . . of hazardous material'' and they are not substantively the same as the HMR, these regulations are preempted.

B. Labeling and Marking Requirements

The HMR require that an ''INFECTIOUS SUBSTANCE'' label must be affixed on packages that contain regulated medical waste unless the packaging is marked with the ''BIOHAZARD'' marking and is being transported by a private or contract carrier. 49 CFR 172.400(a), 172.432, and 173.134(c)(1)(i). The ''INFECTIOUS SUBSTANCE'' label is a white panel with black text. 49 CFR 172.432. The HMR do not differentiate when a label is needed based on whether there is treated or untreated medical waste nor do they define untreated medical waste. N.J.A.C. 7:26–3A.5, however, defines ''untreated regulated medical waste'' as waste ''that has not been treated to substantially reduce or eliminate its potential for causing disease.'' N.J.A.C. 7:26–3A:14 requires that only a container of *untreated* regulated medical waste must have the label ''Medical Waste,'' ''Infectious Waste,'' or display the universal biohazard symbol on the outside of the container. The N.J.A.C. 7:26–3A.14 requirement is not substantively the same as the HMR and therefore is preempted.

Additionally, the HMR require that the inner packagings authorized for large packagings, carts, and bulk outer packagings containing regulated medical waste ''must be durably marked or tagged with the name and location (city and state) of the offeror, except when the entire contents of the Large Packaging, Cart, or BOP originates at a single location and is delivered to a single location.'' 49 CFR 173.197(e). Moreover, the markings for the outer packaging for regulated medical waste of non-bulk packages and bulk packages require only the proper shipping name and UN identification number while the inner packaging for non-bulk packages is required to only be marked with the ''BIOHAZARD'' symbol. 49 CFR 172.301 and 172.304. Bulk packagings that contain infectious substances must be marked with an orange panel containing the UN identification number and the ''BIOHAZARD'' symbol. 49 CFR 172.323 and 172.332.

However, New Jersey requires that all packages containing treated regulated medical waste must to be marked in accordance with N.J.A.C. 7:26–3A:15. According to N.J.A.C. 7:26–3A.5, ''treated regulated medical waste'' means ''regulated medical waste that has been treated to substantially reduce or eliminate its potential for causing disease, but has not yet been destroyed.'' New Jersey's 7:26–3A:15 requires that each ''generator shall mark each individual container of regulated medical waste in accordance with all applicable Federal regulations. . . .,'' and also requires additional markings such as the transporter's name, the date

[3] In the preamble to its August 14, 2002 final rule making ''Revisions to Standards for Infectious Substances,'' PHMSA's predecessor agency, the Research and Special Programs Administration, responded to a comment that it had proposed to ''permit regulated medical waste to be transported in large open-top, roll-off containers. This is not the case. The non-specification bulk packagings authorized for the transportation of RMS must be closed with a lid or closure to prevent intrusion of water into the packaging or release of contents from the packaging.'' 67 FR 53118, 53125.

of shipment, the intermediate handler's name. Thus, because 7:26–3A:15 requires additional markings that the HMR does not, it is not substantively the same and therefore preempted.

Further, N.J.A.C. 7:26–3A.28 requires that each transporter place a water resistant tag below the generator's marking on the outer surface of the container when transferring between transporters with the transporter's name, solid waste registration number, and date of receipt. The HMR do not require such markings or labels; therefore, N.J.A.C. 7:26–3A.28 is preempted.

C. Tracking Form Requirements

The HMR require that any person offering a hazardous material must provide a shipping paper describing the material by:

- The identification number, the proper shipping name, the hazard class, and the packing group of the material, 49 CFR 172.202(a)(1)–(4);
- Total quantity of the material covered by one description, 49 CFR 172.202(c);
- Emergency response telephone number, 49 CFR 172.604; and
- Shipper's certification that the material is ''properly classified, described, packaged, marked and labeled and are in proper condition for transportation . . .'' 49 CFR 172.204(a)(1).

However, except for shipments of hazardous waste for which the EPA hazardous waste manifest is required (*see* 49 CFR 172.205), a hazardous material shipping paper need not be in any specific form or format, nor must it be signed by the transporter or recipient of the shipment. In contrast, N.J.A.C. 7:26–3A.19 and 7:26–3A.31 require the use of a specific ''tracking form'' for shipments of regulated medical waste, which must be prepared in accordance with the instructions found in these regulations. These regulations for use of the tracking form also differentiate between ''NJ Treated'' versus ''NJ Untreated'' medical waste (which the HMR do not) and further require that the transporter and destination facility sign the tracking document.

As explained in ''Massachusetts Requirements on the Storage and Disposal of Infectious or Physically Dangerous Medical or Biological Waste,'' a requirement that the transporter sign the shipping paper is preempted since it is not substantively the same as the federal requirement. Because New Jersey's tracking form requires a signature not required by the HMR, it is not substantively the same as the requirements of the HMR, and is preempted.[4]

Additionally, N.J.A.C. 7:26–3A.33 allows a transporter to consolidate multiple shipments of waste to a new tracking form. The HMR does not have a specific regulation about consolidation of shipments onto a new tracking form. Insofar as N.J.A.C. 7:26–3A.33 does not require a particular form to be used to consolidate the multiple shipments, it is not preempted by the HMR.

N.J.A.C. 7:26–3A.21(a)(1) requires that the generator of the regulated medical waste keep a copy of the tracking form for at least three years from the date waste is accepted by the transporter and 7:26–3A.34 requires the same of the transporter from the date the waste is accepted by the next party. On the other hand, Federal hazardous material transportation law and the HMR require an offeror of a hazardous material to retain a copy of the shipping paper for two years, and a carrier to retain a copy of the shipping paper for one year. 49 U.S.C. 5110, 49 CFR 172.201(e), 177.817(f).[5] I do not find that requirements specifying the time period for which an offeror or transporter must retain a copy of the shipping documents to be within the scope of the ''preparation, execution, and use of shipping documentation'' or ''requirements related to the number, contents, and placement of those documents'' in 49 U.S.C. 5125(b)(1)(C). Nor is there information to show that the longer retention period in N.J.A.C. 7:26–3A.21(a)(1) and 7:26–3A.34 is any obstacle to accomplishing the shorter retention periods in the HMR. The fact that the State's requirement is more stringent does not, by itself, appear to constitute an obstacle for the offeror and transporter meeting the two-year and one-year retention periods in the HMR, respectively. Therefore, as applied to requirements to retain copies of shipping papers, N.J.A.C. 7:26–3A.21(a)(1) and 7:26–3A.34 are not preempted.

[4] The Institute takes issue with N.J.A.C. 7:26–3A.45 and 7:26–3A.47 in its application. We believe that the Institute meant to cite 7:26–3A.45 and 7:26–3A.46 since those both relate to rail transporters while 7:26–3A.47 pertains to alternative or innovative technology authorization. Since N.J.A.C. 7:26–3A.45 and 7:26–3A.46 are similar in substance to the regulations pertaining to highway transporters discussed in this section, they are also preempted. Additionally, we read the intent of N.J.A.C. 7:26–3A.32 and 7:26–3A.41 as ensuring that the hazardous materials reach the intended recipient on the shipping document; to that extent, these provisions are not preempted.

[5] A person who offers a hazardous waste for transportation must retain a copy of the shipping paper for three years. 49 CFR 172.201(e).

D. Exception Reports

N.J.A.C. 7:26–3A.22 requires the generator of the waste to file an exception report with the state when a transporter and/or destination facility fails to return a signed copy of the tracking form to the generator while N.J.A.C. 7:26–3A.21(a)(2) requires the generator to retain a copy of all exception reports submitted for at least three years after the day the exception report was submitted. The Institute asserts that the regulations ''create confusion because shippers may think that an exception report relieves them of failure to have a shipping paper on file.'' The HMR do not provide a parallel requirement. While these requirements relate to transportation of the regulated medical waste, they apply to the generator of the waste and not the transporter. There is not sufficient basis to show that New Jersey's regulations confuse shippers into thinking that they are not required to retain a copy of the shipping paper as required by 49 CFR 172.201(e). The HMR clearly describe the recordkeeping requirements of the shipping papers without any contingencies. New Jersey cannot require a specific tracking form as discussed above, but the requirements to submit and retain the exception report in 7:26–3A.21(a)(2) and 7:26–3A.22 do not appear to create an obstacle in complying with the HMR. Therefore, these requirements are not preempted.

E. Marking a Motor Vehicle With Additional Information

The HMR require that each self-propelled commercial motor vehicle (CMV) be marked with the legal name or a single trade name of the motor carrier operating the self-propelled CMV. 49 CFR 390.21 (as incorporated in the HMR by 49 CFR 177.804(a)). Additionally, the HMR require two types of markings for the outside of a vehicle depending on whether the regulated medical waste is contained in packaging which is bulk or non-bulk. 49 CFR 172.332 and 172.336 require that vehicles containing non-bulk packages of a single hazardous materials with an aggregate gross weight of the hazardous material is 4,000 kg (8,820 pounds) or more to be marked with the identification number on either orange panels or on a plain white square-on-point display configuration having the same outside dimensions as a placard. In accordance with 49 CFR 172.323(b), when a bulk packaging contained in or on a transport vehicle or freight container is marked with a ''BIOHAZARD'' marking which is not visible, then the transport vehicle or freight container must be marked on each side and each end with a ''BIOHAZARD'' marking.

In contrast, N.J.A.C. 7:26–3A.30 requires that the vehicles that transport regulated medical waste have: (1) The name of the transporter; (2) the NJDEP solid waste transporter registration number; and (3) either the words ''Medical Waste'' or ''Infectious Waste'' on two sides and the back of the cargo-carrying body. The N.J.A.C. marking requirement is not substantively the same as the HMR and is therefore preempted.

IV. Ruling

Federal hazardous material transportation law preempts the following requirements in the New Jersey Administrative Code (N.J.A.C.) because the requirements are not substantively the same as the requirements in the HMR:

1. N.J.A.C. 7:26–3A.10(a) that generators must separate into different containers before transport sharps, fluids (greater than 20 cc), and other regulated medical waste;
2. N.J.A.C. 7:26–3A.11(d) which allows a generator to ship oversized medical waste without placing it in a packaging as required by the HMR;
3. N.J.A.C. 7:26–3A.14 that the words ''Medical Waste'' or ''Infectious Waste'' must be labeled on the outside of the package when there is untreated regulated medical waste;
4. N.J.A.C. 7:26–3A.15 that each ''generator shall mark each individual container of regulated medical waste in accordance with all applicable Federal regulations. . . . .'' and that the markings must include details of the transporter's name, the date of shipment, the intermediate handler's name, and other specific information;
5. N.J.A.C. 7:26–3A.19 and those provisions of 7:26–3A.31 which require the use of a specific ''tracking form'' to accompany shipments of regulated medical waste that are prescribed for either the generator or the transporter;
6. N.J.A.C. 7:26–3A.28 that, when transferring between transporters, each transporter must place a water resistant tag below the generator's marking on the outer surface of the container with the transporter's name, solid waste registration number, and date of receipt; and
7. N.J.A.C. 7:26–3A.30 which requires that a vehicle used to transport regulated medical waste must have: (1) The name of the transporter; (2) the NJDEP solid waste transporter registration number; and (3) either the words ''Medical Waste'' or ''Infectious Waste'' on two sides and the back of the cargo-carrying body.
8. N.J.A.C. 7:26–3A.45 to the extent that it requires rail transporters to comply with the transporter requirements of 7:26–3A.28 and 7:26–3A.30.
9. N.J.A.C. 7:26–3A.46 which requires a specific tracking form to accompany shipments of regulated medical waste for rail transporters.

Federal hazardous material transportation law does not preempt the following requirements because they do not create an obstacle in complying with the HMR.

1. N.J.A.C. 7:26–3A.21(a)(1) to the extent that it requires the generator to retain a copy of the shipping paper for at least three years from the date the regulated medical waste was accepted by the transporter;
2. N.J.A.C. 7:26–3A.21(a)(2) to the extent that it requires the generator to retain a copy of any exception report for at least three years after the day the exception report was submitted;
3. N.J.A.C. 7:26–3A.22 to the extent that it requires the generator of the regulated medical waste to file an exception report with the state when a transporter and/or destination facility notifies the generator of any discrepancy between the shipment as accepted by the initial transporter and delivered to the destination facility;
4. N.J.A.C. 7:26–3A.32 to the extent that it requires the transporter to deliver the entire quantity of regulated medical waste to the proper party listed on the tracking form;
5. N.J.A.C. 7:26–3A.33 to the extent that does not require a particular form to be used to consolidate the multiple shipments;
6. N.J.A.C. 7:26–3A.34 to the extent that it requires that the transporter of the regulated medical waste to retain a copy of the shipping paper for at least three years from the date the regulated medical waste was accepted by the next party; and
7. N.J.A.C. 7:26–3A.41 to the extent that it requires intermediate handlers and destination facilities to certify that they had received the listed regulated medical waste.

V. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 107.211(a), any person aggrieved by this decision may file a petition for reconsideration within 20 days of publication of this decision in the **Federal Register.** A petition for judicial review of a final preemption determination must be filed in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final. 49 U.S.C. 5127(a).

This decision will become PHMSA's final decision 20 days after publication in the **Federal Register** if no petition for reconsideration is filed within that time. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5127(a).

If a petition for reconsideration is filed within 20 days of publication in the **Federal Register**, the action by PHMSA's Chief Counsel on the petition for reconsideration will be PHMSA's final action. 49 CFR 107.211(d).

Issued in Washington, DC on December 2, 2013.

Vanessa L. Allen Sutherland,

Chief Counsel.

[FR Doc. 2013–29604 Filed 12–11–13; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35787]

Mark W. Dobronski and Susan K. Dobronski—Acquisition of Control Exemption—Adrian & Blissfield Rail Road Company, Charlotte Southern Railroad Company, Detroit Connecting Railroad Company, Lapeer Industrial Railroad Company and Jackson & Lansing Railroad Company

Mark W. Dobronski and Susan K. Dobronski (Applicants), both noncarriers, have filed a verified notice of exemption under 49 CFR 1180(d)(2) to indirectly control Adrian & Blissfield Rail Road Company (ADBF), a Class III railroad, and ADBF's four Class III railroad subsidiaries: Charlotte Southern Railroad Company (CHS), Detroit Connecting Railroad Company (DCON), Lapeer Industrial Railroad Company (LIRR), and Jackson & Lansing Railroad Company (JAIL).

Applicants state that they control Ferrovia, L.L.C. (Ferrovia), also a noncarrier and a limited liability company, which, until very recently, owned 50 percent of ADBF. On November 15, 2013, two minority shareholders of ADBF were required by court order to sell their outstanding shares back to ADBF. As a result, Ferrovia now owns 58.33 percent of the outstanding shares of ADBF and therefore directly controls ADBF and indirectly controls CHS, DCON, LIRR, and JAIL. Applicants, in turn, now indirectly control ADBF, CHS, DCON, LIRR, and JAIL. Applicants state that they have not entered into an agreement rendering them in indirect control of ADBF and its four carrier subsidiaries.

The transaction is expected to be consummated on December 26, 2013 (the effective date of the exemption, 30 days after the notice of exemption was filed).

Petitioners state that: (1) The rail lines operated by ADBF and its four subsidiaries do not connect with each other; [1] (2) this transaction is not part of a series of anticipated transactions that would connect the rail lines operated by ADBF, CHS, DCON, LIRR, and JAIL with any of their affiliated railroads; and (3) this transaction does not involve a Class I rail carrier. Therefore, the transaction is exempt from the prior approval acquirements of 49 U.S.C. 11323 pursuant to 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here because all of the carriers involved are Class III carriers.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than December 19, 2013 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35787, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, a copy must be served on Karl Morell, Ball Janik LLP, 655 Fifteenth Street, NW., Suite 225, Washington, DC 20005.

Board decisions and notices are available on our Web site at "*www.stb.dot.gov.*"

Decided: December 9, 2013.

[1] ADBF operates a 20-mile rail line between Adrian and Riga, Mich. CHS operates a 3.5-mile rail line near Charlotte, Mich. DCON operates a 2.5-mile rail line in Detroit, Mich. LIRR operates a 1.5-mile rail line in LaPeer, Mich. JAIL operates a 47-mile rail line between Jackson and Lansing, Mich.

By the Board, Rachel D. Campbell, Director, Office of Proceedings

Raina S. White,

Clearance Clerk.

[FR Doc. 2013–29691 Filed 12–11–13; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to comment on a currently approved information collection that is due for extension approval by the Office of Management and Budget. The Terrorism Risk Insurance Program Office within the Department of the Treasury is soliciting comments concerning the Commercial Property and Casualty Insurers Submission for Federal Share Compensation Requirements set forth in 31 CFR part 50, subpart F (Sec. 50.50–50.54).

DATES: Written comments should be received on or before February 10, 2014 to be assured of consideration.

ADDRESSES: Submit comments by email to *triacomments@do.treas.gov* or by mail (if hard copy, preferably an original and two copies) to: Terrorism Risk Insurance Program, Public Comment Record, Suite 2100, Department of the Treasury, 1425 New York Ave. NW., Washington, DC 20220. Because paper mail in the Washington DC area may be subject to delay, it is recommended that comments be submitted electronically. All comments should be captioned with "PRA Comments—Commercial Property and Casualty Insurers Submission for Federal Share Compensation". Please include your name, affiliation, address, email address and telephone number in your comment. Comments will be available for public inspection by appointment only at the Reading Room of the Treasury Library. To makes appointments, call (202) 622–0990 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to: Terrorism Risk Insurance Program Office at (202) 622–6770 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

OMB Number: 1505–0200.

Title: Terrorism Risk Insurance Program—Commercial Property and Casualty Insurers Submission for Federal Share Compensation.

Abstract: Sections 103(a) and 104 of the Terrorism Risk Insurance Act of 2002 (Pub. L. 107–297) (as extended by the Terrorism Risk Insurance Extension Act of 2005 (Pub. L. 109–144) and the Terrorism Risk Insurance Program Reauthorization Act of 2007 (Pub. L. 110–160) authorize the Department of the Treasury to administer and implement the Terrorism Risk Insurance Program established by the Act. In 31 CFR part 50, subpart F (Sec. 50.50–50.54) Treasury established requirements and procedures for insurers that file claims for payment of the Federal share of compensation for insured losses resulting from a certified act of Terrorism under the Act.

Type of Review: Extension of a currently approved data collection.

Affected Public: Business/Financial Institutions.

Estimated Number of Respondents: 100.

Estimated Average Time per Respondent: 42 hours.

Estimated Total Annual Burden Hours: 4200 hours.

Request for Comments.: An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collections; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: December 3, 2013.

Jeffrey S. Bragg,

Director, Terrorism Risk Insurance Program.

[FR Doc. 2013–29675 Filed 12–11–13; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

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Part II

Commodity Futures Trading Commission

17 CFR Parts 1, 15, 17, et al.

Position Limits for Derivatives; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 15, 17, 19, 32, 37, 38, 140, and 150

RIN 3038–AD99

Position Limits for Derivatives

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission proposes to amend regulations concerning speculative position limits to conform to the Wall Street Transparency and Accountability Act of 2010 (''Dodd-Frank Act'') amendments to the Commodity Exchange Act (''CEA'' or ''Act''). The Commission proposes to establish speculative position limits for 28 exempt and agricultural commodity futures and option contracts, and physical commodity swaps that are ''economically equivalent'' to such contracts. In connection with establishing these limits, the Commission proposes to update some relevant definitions; revise the exemptions from speculative position limits, including for bona fide hedging; and extend and update reporting requirements for persons claiming exemption from these limits. The Commission proposes appendices that would provide guidance on risk management exemptions for commodity derivative contracts in excluded commodities permitted under the proposed definition of bona fide hedging position; list core referenced futures contracts and commodities that would be substantially the same as a commodity underlying a core referenced futures contract for purposes of the proposed definition of basis contract; describe and analyze fourteen fact patterns that would satisfy the proposed definition of bona fide hedging position; and present the proposed speculative position limit levels in tabular form. In addition, the Commission proposes to update certain of its rules, guidance and acceptable practices for compliance with Designated Contract Market (''DCM'') core principle 5 and Swap Execution Facility (''SEF'') core principle 6 in respect of exchange-set speculative position limits and position accountability levels.

DATES: Comments must be received on or before February 10, 2014.

ADDRESSES: You may submit comments, identified by RIN number 3038–AD99 by any of the following methods:

- *Agency Web site: http://comments.cftc.gov.*
- *Mail:* Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedure established in § 145.9 of the Commission's regulations (17 CFR 145.9).

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse, or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Stephen Sherrod, Senior Economist, Division of Market Oversight, at (202) 418–5452, *ssherrod@cftc.gov;* Riva Spear Adriance, Senior Special Counsel, Division of Market Oversight, at (202) 418–5494, *radriance@cftc.gov;* David N. Pepper, Attorney-Advisor, Division of Market Oversight, at (202) 418–5565, *dpepper@cftc.gov,* Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

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I. Position Limits for Physical Commodity Futures and Swaps

A. Background

1. CEA Section 4a

Speculative position limits have been used as a tool to regulate futures markets for over seventy years. Since the Commodity Exchange Act of 1936,[1] Congress has repeatedly expressed confidence in the use of speculative position limits as an effective means of preventing unreasonable and unwarranted price fluctuations.[2]

CEA section 4a, as amended by the Dodd-Frank Act, provides the Commission with broad authority to set position limits. When Congress created the Commission in 1974, it reiterated that the purpose of the CEA was to prevent fraud and manipulation and to control speculation. Later, the Commodity Futures Modernization Act of 2000 (''CFMA'') provided a statutory basis for exchanges to use pre-existing position accountability levels as an alternative means to limit the burdens of excessive speculative positions. Nevertheless, the CFMA did not weaken the Commission's authority in CEA section 4a to establish position limits to prevent such undue burdens on interstate commerce.[3] More recently, in the CFTC Reauthorization Act of 2008, Congress gave the Commission expanded authority to set position limits for significant price discovery contracts on exempt commercial markets.[4]

In 2010, the Dodd-Frank Act expanded the Commission's authority to set position limits by amending CEA section 4a(a)(1) to authorize the Commission to establish position limits not just for futures and option contracts, but also for swaps that are economically equivalent to covered futures and options contracts,[5] swaps traded on a DCM or SEF, swaps that are traded on or subject to the rules of a DCM or SEF, and swaps not traded on a DCM or SEF that perform or affect a significant price discovery function with respect to regulated entities (''SPDF Swaps'').[6] CEA section 4a(a)(1) further declares the Congressional determination that: ''[e]xcessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets or derivatives transaction execution facilities, or swaps that perform or affect a significant price discovery function with respect to registered entities causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity.''[7]

As described below, amended CEA section 4a(a)(2), Congress directed, *i.e.,* mandated, that the Commission ''shall'' establish limits on the amount of positions, as appropriate, that may be held by any person in agricultural and exempt commodity futures and options contracts traded on a DCM.[8] Similarly, as described below, in amended CEA section 4a(a)(5),[9] Congress mandated that the Commission impose position limits on swaps that are economically equivalent to the agricultural and exempt commodity derivatives for which it mandated position limits in CEA section 4a(a)(2).

With respect to the position limits that the Commission is required to set, CEA section 4a(a)(3) guides the Commission in setting the level of those limits by providing several criteria for the Commission to address, namely: (i) To diminish, eliminate, or prevent excessive speculation as described under this section; (ii) to deter and prevent market manipulation, squeezes, and corners; (iii) to ensure sufficient market liquidity for bona fide hedgers; and (iv) to ensure that the price discovery function of the underlying market is not disrupted.[10]

CEA section 4a(a)(5) requires the Commission to establish, at an appropriate level, position limits for swaps that are economically equivalent to those futures and options that are subject to mandatory position limits pursuant to CEA section 4a(a)(2).[11] CEA section 4a(a)(5) also requires that the position limits on economically equivalent swaps be imposed at the same time as mandatory limits are imposed on futures and options.[12]

CEA section 4a(a)(6) requires the Commission to apply position limits on an aggregate basis to contracts based on the same underlying commodity across: (1) Contracts listed by DCMs; (2) with respect to foreign boards of trade (''FBOTs''), contracts that are price-linked to a contract listed for trading on a registered entity and made available from within the United States via direct access; and (3) SPDF Swaps.[13]

Furthermore, under new CEA section 4a(a)(7), Congress gave the Commission authority to exempt persons or transactions from any position limits it establishes.[14]

2. The Commission Construes CEA Section 4a(a) To Mandate That the Commission Impose Position Limits

The Commission concludes that, based on its experience and expertise, when section 4a(a) of the Act is considered as an integrated whole, it is reasonable to construe that section to mandate that the Commission impose position limits. This mandate requires the Commission to impose limits on futures contracts, options, and certain swaps for agricultural and exempt commodities. The Commission also

[1] 7 U.S.C. 1 *et seq.*

[2] *See, e.g.,* H.R. Rep. No. 421, 74th Cong., 1st Sess. 1 (1935); H.R. Rep. No. 624, 99th Cong., 2d Sess. 44 (1986).

[3] *See* Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (Dec. 21, 2000).

[4] *See* Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

[5] *See infra* discussion of economically equivalent.

[6] CEA section 4a(a)(1) (as amended 2010) ; 7 U.S.C. 6a(a)(1).

[7] *Id.*

[8] CEA section 4a(a)(2); 7 U.S.C. 6a(a)(2).

[9] CEA section 4a(a)(5); 7 U.S.C. 6a(a)(5).

[10] CEA section 4a(a)(3); 7 U.S.C. 6a(a)(3).

[11] CEA section 4a(a)(5); 7 U.S.C. 6a(a)(5).

[12] *See id.*

[13] CEA section 4a(a)(6); 7 U.S.C. 6a(a)(6).

[14] CEA section 4a(a)(7); 7 U.S.C. 6a(a)(7).

concludes that the mandate requires it to impose such limits without first finding that any such limit is necessary to prevent excessive speculation in a particular market.

In *ISDA* v. *CFTC*,[15] the district court concluded that section 4a(a)(1) of the Act ''unambiguously requires that, prior to imposing position limits, the Commission find that position limits are necessary to 'diminish, eliminate, or prevent' the burden described in [section 4a(a)(1) of the Act].'' [16] But the court further concluded that, even if CEA section 4a(a)(1) standing alone required the Commission to make a necessity determination as a prerequisite to imposing position limits, it was plausible to conclude that sections 4a(a)(2), (3), and (5) of the Act, which were added by Dodd-Frank, constituted a mandate, requiring the Commission to impose position limits without making any findings of necessity. The court ultimately determined that the Dodd-Frank amendments, and their relationship to section 4a(a)(1) of the Act, are ''ambiguous and lend themselves to more than one plausible interpretation.'' [17] Thus, the court rejected the Commission's contention that section 4a(a) of the Act unambiguously mandated the imposition of position limits without any finding of necessity.

Having concluded that section 4a(a) of the Act is ambiguous, the court could not rely on the Commission's interpretation to resolve the section's ambiguity. As the court observed, the D.C. Circuit has held that '' 'deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress.' '' [18] The court further held that, pursuant to the law of the D.C. Circuit, it was required to remand the matter to the Commission so that it could ''fill in the gaps and resolve the ambiguities.'' [19] The court cautioned the Commission that, in resolving the ambiguity of section 4a(a) of the Act, '' 'it is incumbent upon the agency not to rest simply on its parsing of the statutory language.' '' [20]

The Commission now undertakes the task assigned by the court: using its experience and expertise to resolve the ambiguity the district court perceived in section 4a(a) of the Act. The most important guidepost for the Commission in resolving the ambiguity is section 4a(a)(2) of the Act. That section, which is captioned ''Establishment of Limitations,'' includes two sections that are critical to understanding congressional intent. Subsection 4a(a)(2)(A) provides that the Commission, in accordance with the standards set forth in section 4a(a)(1) of the Act, shall establish limits on the amount of positions, as appropriate, other than bona fide hedge positions that may be held by any person with respect to physical commodities other than excluded commodities.[21] Subsection 4a(a)(2)(B) provides that for exempt commodities, the limits ''required'' under subsection 4a(a)(2)(A) be established within 180 days of the enactment of section 4a(a)(2)(B) and that for agricultural commodities, the limits ''required'' under subsection 4a(a)(2)(A) be established within 270 days of the enactment of section 4a(a)(2)(B).[22]

The court concluded that this section was ambiguous as to whether the Commission had a mandate to impose position limits. The court focused on the opening phrase of subsection (A)—''[i]n accordance with the standards set forth in [section 4a(a)(1) of the Act].'' The court held that the term ''standards'' in section 4a(a)(2) of the Act was ambiguous and could refer to the requirement in section 4a(a)(1) of the Act that the Commission impose position limits ''as [it] finds are necessary to diminish, eliminate, or prevent'' an unnecessary burden on interstate commerce.[23] Thus, the court held that it was plausible that section 4a(a)(2) of the Act required the Commission to make a finding of necessity as a precondition to imposing any position limit. But the court held that it was also plausible that the reference to ''standards'' did not incorporate such a requirement.

The Commission believes that it is reasonable to conclude from the Dodd-Frank amendments that Congress mandated limits and did not intend for the Commission to make a necessity finding as a prerequisite to the imposition of limits. The Commission's interpretation of its mandate is also based on congressional concerns that arose, and congressional actions taken, before the passage of the Dodd-Frank amendments. During the years leading up to the enactment, Congress conducted several investigations that concluded that excessive speculation accounted for significant volatility and price increases in physical commodity markets. A congressional investigation determined that prices of crude oil had risen precipitously and that ''[t]he traditional forces of supply and demand cannot fully account for these increases.'' [24] The investigation found evidence suggesting that speculation was responsible for an increase of as much as $20–25 per barrel of crude oil, which was then at $70.[25] Subsequently, Congress found similar price volatility stemming from excessive speculation in the natural gas market.[26] Thus, these investigations had already gathered evidence regarding the impact of excessive speculation, and had concluded that such speculation imposed an undue burden on the economy. In light of these investigations and conclusions, it is reasonable for the Commission to conclude that Congress did not intend for it to duplicate investigations Congress had already conducted, and did not intend to leave it up to the Commission whether there should be federal limits. Instead, Congress set short deadlines for the limits it ''required,'' and directed the Commission to conduct a study of the limits *after* their imposition and to report to Congress promptly on their effects. Accordingly, the Commission believes that the better reading of the Dodd-Frank amendments, in light of the congressional investigations and findings made, is the Dodd-Frank amendments require the Commission to impose position limits on physical commodity derivatives as opposed to merely reaffirming the preexisting, discretionary authority the Commission has long had to impose limits as it finds necessary. Congress made the decision to impose limits, and it is for the Commission to carry that decision out, subject to close congressional oversight.

Based on its experience, the Commission concludes that Congress could not have contemplated that, as a prerequisite to imposing limits, the Commission would first make the sort of

[15] *International Swaps and Derivatives Association* v. *United States Commodity Futures Trading Commission,* 887 F. Supp. 2d 259 (D.D.C. 2012).

[16] *Id.* at 270.

[17] *Id.* at 281.

[18] *Id.* at 280–82, quoting *Peter Pan Bus Lines, Inc.* v. *Fed. Motor Carrier Safety Admin.,* 471 F.3d 1350, 1354 (D.C. Cir. 2006).

[19] 887 F. Supp. 2d at 282.

[20] *Id.* at n.7, quoting *PDK Labs. Inc.* v. *DEA,* 362 F.3d 786, 797 (D.C. Cir. 2004).

[21] CEA section 4a(a)(2)(A); 7 U.S.C. 6a(a)(2)(A).

[22] CEA section 4a(a)(2)(B); 7 U.S.C. 6a(a)(2)(B).

[23] 887 F. Supp. 2d at 274–76.

[24] ''The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat,'' Staff Report, Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs, U.S. Senate, S. Prt. No. 109–65 at 1 (June 27, 2006).

[25] *Id.* at 12; *see also* ''Excessive Speculation in the Natural Gas Market,'' Staff Report, Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs, U.S. Senate at 1 (June 25, 2007) available at *http://www.levin.senate.gov/imo/media/doc/supporting/2007/PSI.Amaranth.062507.pdf* (last visited Mar. 18, 2013) (''Gas Report'').

[26] Gas Report at 1–2.

necessity determination that the plaintiffs in *ISDA* v. *CFTC* argue section 4a(a)(2) of the Act requires—*i.e.,* a finding that, before imposing any limit in any particular market, there is a reasonable likelihood that excessive speculation will pose a problem in that market, and that position limits are likely to curtail that excessive speculation without imposing undue costs.[27] As the district court noted, for 45 years after passage of the CEA, the Commission's predecessor agency made findings of necessity in its rulemakings establishing position limits.[28] During that period, the Commission had jurisdiction over only a limited number of agricultural commodities. The court cited several orders issued by the Commodity Exchange Commission (''CEC'') between 1940 and 1956 establishing position limits, and in each of those orders, the CEC stated that the limits it was imposing were necessary. Each of those orders involved no more than a small number of commodities. But it took the CEC many months to make those findings. For example, in 1938, the CEC imposed position limits on six grain products.[29] Proceedings leading up to the establishment of the limits commenced more than 13 months earlier, when the CEC issued a notice of hearings regarding the limits.[30] Similarly, in September 1939, the CEC issued a Notice of Hearing with respect to position limits for cotton, but it was not until August 1940 that the CEC finally promulgated such limits.[31] And the CEC began the process of imposing limits on soybeans and eggs in January 1951, but did not complete the process until more than seven months later.[32]

In the Commission's experience (*i.e.,* in the experience of its predecessor agency), it took at least four months to make a necessity finding with respect to one commodity. The process of making the sort of necessity findings that plaintiffs urged upon the court with respect to all agricultural commodities and all exempt commodities would be far more lengthy than the time allowed by section 4a(a)(3) of the Act, *i.e.,* 180 or 270 days.

[27] *See* 887 F. Supp. 2d at 273.

[28] *Id.* at 269.

[29] *See* 3 FR 3145, Dec. 24, 1938.

[30] *See* 2 FR 2460, Nov. 12, 1937.

[31] *See* 4 FR 3903, Sep. 14, 1939; 5 FR 3198, Aug. 28, 1940.

[32] *See* 16 FR 321, Jan. 12, 1951; 16 FR 8106, Aug. 16, 1951; *see also* 17 FR 6055, Jul. 4, 1952 (notice of hearing regarding proposed position limits for cottonseed oil, soybean oil, and lard); 18 FR 443, Jan. 22, 1953 (orders setting limits for cottonseed oil, soybean oil, and lard); 21 FR 1838, Mar. 24, 1956 (notice of hearing regarding proposed position limits for onions), 21 FR 5575, Jul. 25, 1956 (order setting position limits for onions).

Dodd-Frank requires the Commission to impose position limits on all exempt commodities within 180 days after enactment, and on all agricultural commodities within 270 days.[33] Because of these stringent time limits, the Commission concludes that Congress did not intend for the Commission to delay the imposition of limits until it has first made antecedent, contract-by-contract necessity findings.[34]

Additional experience of the Commission confirms this interpretation. The Commission has found, historically, that speculative position limits are a beneficial tool to prevent, among other things, manipulation of prices. Limits do so by restricting the size of positions held by noncommercial entities that do not have hedging needs in the underlying physical markets. In other words, markets that have underlying physical commodities with finite supplies benefit from the protections offered by position limits. This will be discussed further, below.

For example, in 1981, the Commission, acting expressly pursuant to, *inter alia,* what was then CEA Section 4a(1) (predecessor to CEA section 4a(a)(1)), adopted what was then § 1.61.[35] This rule required speculative position limits for ''for each separate type of contract for which delivery months are listed to trade'' on any DCM, including ''contracts for future delivery of any commodity subject to the rules of such contract market.''[36] The Commission explained that this action was necessary in order to ''close the existing regulatory gap whereby some but not all contract markets [we]re subject to a specified speculative position limit.''[37] Like the Dodd-Frank Act, the 1981 final rule established (and the rule release described) that such limits ''shall'' be established according to what the Commission termed ''standards.''[38] As used in the 1981 final rule and release, ''standards'' meant the criteria for determining how the required limits would be set.[39] ''Standards'' did not include the antecedent judgment of *whether* to order limits at all. The Commission had already made the antecedent judgment in the rule that ''speculative limits are appropriate for all contract markets irrespective of the characteristics of the underlying market.''[40] It further concluded that, with respect to any particular market, the ''existence of historical trading data'' showing excessive speculation or other burdens on that market is not ''an essential prerequisite to the establishment of a speculative limit.''[41] The Commission thus directed the exchanges to set limits for all futures contracts ''pursuant to the . . . standards of rule 1.61[.]''[42] And § 1.61 incorporated the standards from then-CEA-section 4a(1)—an ''Aggregation Standard'' (46 FR at 50943) for applying the limits to positions both held and controlled by a trader and a flexibility standard, allowing the exchanges to set ''different and separate position limits for different types of futures contracts, or for different delivery months, or from exempting positions which are normally known in the trade as 'spreads, straddles or arbitrage' or from fixing limits which apply to such positions which are different from limits fixed for other positions.''[43]

The language that ultimately became section 737 of the Dodd-Frank Act, amending CEA section 4a(a), originated in substantially final form in H.R. 977, introduced by Representative Peterson,

[33] Although the Commission did not meet these deadlines in its first position limits rulemaking, it completed the task (in which the Commission received and addressed more than 15,000 comments) as expeditiously as possible under the circumstances.

[34] Even if there were no mandate, the Commission would not need to make the sort of particularized necessity findings advocated by the plaintiffs in *ISDA* v. *CFTC,* and discussed by the district court. When the Commission imposed limits pre-Dodd-Frank, it only had to determine that excessive speculation is harmful to the market and that limits on speculative positions are a reasonable means of preventing price disruptions in the marketplace that place an undue burden on interstate commerce. That is the determination that the Commission made in 1981 when it required the exchanges to establish position limits on all futures contracts, regardless of the characteristics of a particular contract market. *See* 46 FR 50940 (''[I]t is the Commission's view that this objective [''the prevention of large and/or abrupt price movements which are attributable to extraordinarily large speculative positions''] is enhanced by speculative position limits since it appears that the capacity of any contract market to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, *i.e.,* the capacity of the market is not unlimited.''). In the immediate wake of that decision, Congress enacted legislation to give the Commission the specific authority to enforce those omnibus limits. *See* CEA section 4a(e); 7 U.S.C. 6a(e).

[35] 46 FR 50938, 50944–45, Oct. 16, 1981. The rule adopted in 1981 tracked, in significant part, the language of Section 4a(1). *Compare* 17 CFR 1.61(a)(1) (1982) *with* 7 U.S.C. 6a(1) (1976).

[36] 46 FR 50945.

[37] *Id.* 50939; *see also id.* 50938 (''to ensure that each futures and options contract traded on a designated contract market will be subject to speculative position limits'').

[38] *Compare id.* at 50941–42, 50945 *with* 7 U.S.C. 6a(a)(2)(A).

[39] 46 FR 50941–42, 50945.

[40] *Id.* at 50941.

[42] *Id.* at 50942.

[43] *Id.* at 50945 (§ 1.61(a)). *Compare* 7 U.S.C. 6a(1) (1976).

who was then Chairman of the House Agriculture Committee and who would ultimately be a member of the Dodd-Frank conference committee.[44] H.R. 977 appears influenced by the Commission's 1981 rulemaking, establishing that there ''shall'' be position limits in accordance with the ''standards'' identified in CEA section 4a(a).[45] Like the 1981 rule, H.R. 977 established (and the Dodd-Frank Act ultimately adopted) a ''good faith'' exception for positions acquired prior to the effective date of the mandated limits.[46] The committee report accompanying H.R. 977 described it as ''Mandat[ing] the CFTC to set speculative position limits'' and the section-by-section analysis stated that the legislation ''requires the CFTC to set appropriate position limits for all physical commodities other than excluded commodities.'' [47] This closely resembles the omnibus prophylactic approach the Commission took in 1981, when the Commission required the establishment of position limits on all futures contracts according to ''standards'' it borrowed from CEA section 4a(1), and the Commission finds the history and interplay of the 1981 rule and Dodd-Frank section 737 to be further evidence that Congress intended to follow much the same approach as the Commission did in 1981, mandating position limits as to all physical commodities.[48]

Consistent with this interpretation, which is based on the Commission's experience, CEA section 4a(a)(2)(A)'s phrase ''[i]n accordance with the standards set forth in [CEA section 4a(a)(1)]'' does not require a finding of necessity as a prerequisite to the imposition of position limits, but rather has a different meaning. Section 4a(a)(1) of the Act lists ''standards'' that the Commission must consider, and has historically considered, when it imposes position limits. It contains an aggregation standard, which provides that, if one person controls the positions of another, or if those persons coordinate their trading, then those positions must be aggregated. And it contains a flexibility standard, providing the Commission with the flexibility to impose different position limits for different commodities, markets, delivery months, etc.[49] Because the Commission concludes that, when Congress amended section 4a(a) of the Act and directed the Commission to establish the ''required'' limits, it did not want, much less require the Commission to make an antecedent finding of necessity for every position limit it imposes, the ''standards'' the Commission must apply in imposing the limits required by section 4a(a)(2) of the Act consist of the aggregation standard and the flexibility standard of CEA section 4a(a)(1), the same standards the Commission required the exchanges to apply the last time there was a mandatory, prophylactic position limits regime.[50]

In addition, section 719 of the Dodd-Frank Act (codified at 15 U.S.C. 8307) provides that the Commission ''shall conduct a study of the effects (if any) of the position limits imposed'' pursuant to CEA section 4a(a)(2), that ''[w]ithin 12 months after the imposition of position limits,'' the Commission ''shall'' submit a report of the results of that study to Congress, and that, within 30 days of the receipt of that report, Congress ''shall'' hold hearings regarding the findings of that report. As explained above, if, as a precondition to imposing position limits, the Commission were required to make the sort of necessity determinations apparently contemplated by the district court, the Commission would have to conduct time-consuming studies and then determine as a matter of discretion whether a limit was necessary. The Commission believes that, to comply with section 719 of the Dodd-Frank Act, the Commission would then, within one year, have to conduct another round of studies with respect to each contract as to which it had imposed limits. The Commission does not believe that Congress would have imposed such burdensome and duplicative requirements on the Commission. Moreover, Congress would not have required the Commission to conduct a study of the effects, ''if any,'' of position limits, and would not have imposed a hearing requirement on itself, if the Commission had the discretion to not impose any position limits at all.[51]

Further, Congress was careful to make clear that its mandate only extends to agricultural and exempt commodities. If there were no mandate, then the same standards that apply to position limits for excluded commodities would also apply to agricultural and exempt commodities and, basically, the Commission would have only permissive authority to promulgate position limits for any commodity—the same permissive authority that existed prior to the Dodd-Frank Act. Finding that a mandate exists is the only way to give effect to the distinction that Congress drew.

The legislative history of the Dodd-Frank amendments to CEA section 4a(a) confirms that Congress intended to make position limits mandatory for agricultural and exempt commodities. As initially introduced, the House version of the bill that became Dodd-Frank provided the Commission with discretionary authority to issue position limits by stating that the Commission ''may'' impose them.[52] However, by the time the bill passed the House, it dispensed with the permissive approach in favor of a mandate, stating that the Commission ''shall'' impose limits, and

[44] H.R. 977, 11th Cong. (2009).

[45] 7 U.S.C. 6.

[46] *Compare* H.R. 977, 11th Cong. (2009) *with* 46 FR 50944.

[47] H.Rept. 111–385, at 15, 19 (Dec. 19, 2009).

[48] *See Union Carbide Corp. & Subsidiaries* v. *Comm'r of Internal Revenue,* 697 F.3d 104, (2d Cir. 2012) (explaining that when an agency must resolve a statutory ambiguity, to do so '' 'with the aid of reliable legislative history is rational and prudent' '' (quoting Robert A. Katzman, Madison Lecture: Statutes, 87 N.Y.U. L. Rev. 637, 659 (2012)).

[49] In its 1981 rulemaking in which the Commission required exchanges to impose position limits, the Commission interpreted the term ''standards,'' to not require exchanges to make any finding of necessity with respect to imposing position limits. *See* 46 FR. 50941–42 (preamble), 50945 (text of § 1.61(a)(2)).

[50] The District Court expressed concern that, unless CEA section 4a(a)(2) incorporated a necessity finding, then the language referring to such a finding in CEA section 4a(a)(1) might be rendered surplusage. 887 F. Supp. 2d at 274–75. That is, the court believed that, unless a necessity finding were incorporated into any limits required by CEA section 4a(a)(2), then the ''finds as necessary'' language would serve no purpose in the CEA. But there is no surplusage because CEA section 4a(a) only mandates position limits with respect to *physical* commodity derivatives (*i.e.,* agricultural commodities and exempt commodities). The mandate does not apply to excluded commodities (*i.e.,* intangible commodities such as interest rates, exchange rates, or indexes, *see* CEA section 1a(19) (defining the term ''excluded commodity''). As a result, although a necessity finding does not apply with respect to physical commodities as to which the Dodd-Frank Congress mandated position limits, it still applies to any limits the Commission may choose to impose with respect to excluded commodities. Thus, the mandate of CEA section 4a(a) does not render the necessity language surplusage.

[51] When Congress requires an agency to promulgate a rule, it frequently requires the agency to provide it with a report regarding the impact of that rule. *See, e.g.,* 15 U.S.C. 6502, 6506 (provisions of the Children's Online Privacy Protection Act, requiring the FTC to promulgate implementing rules, and to report as to the impact thereof); 47 U.S.C. 227(b), (h) (requiring the FCC to implement rules restricting unsolicited fax advertising, and to report on enforcement); 15 U.S.C. 78m(p) (requiring the SEC to issue rules requiring disclosures regarding the use of certain ''conflict minerals'' obtained from the Democratic Republic of Congo), and section 1502(d) of the Dodd-Frank Act (requiring the Comptroller General to report regarding the effectiveness of the conflict minerals rule).

[52] Initially, the House used the word ''may'' to permit the Commission to impose aggregate positions on contracts based upon the same underlying commodity. *See* H.R. 4173, 11th Cong. section 3113(a)(2) (as introduced in the House, Dec. 2, 2009) (''Introduced Bill''); *see also* Brief of Senator Levin et al as *Amicus Curiae* at 10–11, *ISDA* v. *CFTC,* no. 12–5362 (D.C. Cir. Apr. 22, 2013), Document No. 1432046 (hereafter ''Levin Br.'').

in addition, the House added two new subsections, mandating the imposition of limits for agricultural and exempt commodities with the tight deadlines described above.[53] Similarly, it was only after the initial bill was amended to make position limits mandatory that the House bill referred to the limits for agricultural and exempt commodities as ''required'' in one instance.[54] Furthermore, Congress decided to include the requirement that the Commission conduct studies on the ''effects (if any) of position limits imposed'' [55] to determine if the required position limits were harming US markets only after position limits went from discretionary to mandatory.[56] To remove all doubt, the House Report accompanying the House Bill also made clear that the House amendments to the position limits bill ''required'' the Commission to impose limits.[57] The Conference Committee adopted the provisions of the House bill with regard to position limits and then strengthened them by referring to the position limits as ''required'' an additional three times so that CEA section 4a(a), as enacted referred, to position limits as ''required'' a total of four times.[58]

Considering the text, purpose and legislative history of section 4a(a) as a whole, along with its own experience and expertise, the Commission believes that it is reasonable to conclude that Congress—notwithstanding the ambiguity the district court found to arise from some of the words in the statute—decided that position limits were necessary with respect to physical commodities, mandated the Commission to impose them on physical commodities, and required that the Commission do so expeditiously.[59]

3. Necessity Finding

As explained above, the Commission concludes that the CEA mandates the imposition of speculative position limits. Because of this mandate, the Commission need not make a prerequisite finding that such limits are necessary ''to diminish, eliminate or prevent excessive speculation causing sudden or unreasonable fluctuations or unwarranted changes in the prices of'' commodities under pre-Dodd-Frank CEA section 4a(a)(1). Nonetheless, out of an abundance of caution in light of the district court decision in *ISDA* v. *CFTC,* and without prejudice to any argument the Commission may advance in any forum, the Commission proposes, as a separate and independent basis for the proposed Rule, a preliminary finding herein that such limits are necessary to achieve their statutory purposes.[60]

Historically, speculative position limits have been one of the tools used by the Commission to prevent, among other things, manipulation of prices. Limits do so by restricting the size of positions held by noncommercial entities that do not have hedging needs in the underlying physical markets. By capping the size of speculative positions, limits lessen the likelihood that a trader can obtain a large enough position to potentially manipulate prices, engage in corners or squeezes or other forms of price manipulation. The position limits in this proposal are necessary as a prophylactic measure to lessen the likelihood that a trader will accumulate excessively large speculative positions that can result in corners, squeezes, or other forms of manipulation that cause unwarranted or unreasonable price fluctuations. In the Commission's experience, position limits are also necessary as a prophylactic measure because excessively large speculative positions may cause sudden or unreasonable price fluctuations even if not accompanied by manipulative conduct. Two examples that inform the Commission's determinations are the silver crisis of 1979–80 and events in the natural gas markets in 2006.[61]

Position limits would help to deter and prevent manipulative corners and squeezes, such as the silver price spike caused by the Hunt brothers and their cohorts in 1979–80.

A market is ''cornered'' when an individual or group of individuals acting in concert acquire a controlling or ownership interest in a commodity that is so dominant that the individual or group of individuals can set or manipulate the price of that commodity.[62] In a short squeeze, an excess of demand for a commodity together with a lack of supply for that commodity forces the price of that commodity upward. During a short squeeze, individuals holding short positions, *i.e.,* sales for future delivery of a commodity,[63] are typically forced to purchase that commodity in situations where the price increases rapidly, in order to exit their short position and/or cover,[64] *i.e.,* be able to deliver the commodity in accordance with the terms of the sale.[65]

A rapid rise and subsequent sharp decline in silver prices occurred from the second half of 1979 to the first half of 1980 when the Hunt brothers [66] and colluding syndicates [67] attempted to corner the silver market by hoarding silver and executing a short squeeze. Prices deflated only after the Commodity Exchange, Inc. (''COMEX'')

[53] Levin Br. at 11 (citing H.R. 4173, 111th Cong. section 3113(a)(5)(2), (7) (as passed by the House Dec. 11, 2009) (''Engrossed Bill'')).

[54] *Id.* at 12. (citing Engrossed Bill at section 3113(a)(5)(3)).

[55] 15 U.S.C. 8307.

[56] *See* Levin Br. at 13–17; *see also* DVD: October 21, 2009 Business Meeting (House Agriculture Committee 2009), *ISDA* v. *CFTC,* Dkt. 37–2 Exh. B (Apr. 13, 2012) at 59:55–1:02:18.

[57] Levin Br. at 23 (citing H.R. Rep. No. 111–373 at 11 (2009)).

[58] Levin Br. at 17–18.

[59] The district court noted that CEA sections 4a(a)(2), (3), and (5)(A) contain the words ''as appropriate.'' The court held that it was ambiguous whether those words referred to the Commission's obligation to impose limits (*i.e.,* the Commission shall, ''as appropriate,'' impose limits), or to the level of the limits the Commission is to impose. Because, as explained above, the Commission believes it is reasonable to interpret CEA section 4a(a) to mandate the imposition of limits, the words ''as appropriate'' must refer to the level of limits, *i.e.,* the Commission must set limits at an appropriate level. Thus, while Congress made the threshold decision to impose position limits on physical commodity futures and options and economically equivalent swaps, Congress at the same time delegated to the Commission the task of setting the limits at levels that would maximize Congress' objectives. *See* CEA sections 4a(a)(3)(A)–(B).

[60] The CEA does not define ''excessive speculation.'' But the Commission has historically associated it with extraordinarily large speculative positions. 76 FR at 71629 (referring to ''extraordinarily large speculative positions'').

[61] Since the 1920's, Congressional and other official governmental investigations and reports have identified other instances of sudden or unreasonable fluctuations or unwarranted changes in the price of commodities. *See* discussion below.

[62] *See* CFTC Glossary, A Guide to the Language of the Futures Industry (''CFTC Glossary''), available at *http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/glossary,* which defines a corner as ''(1) [s]ecuring such relative control of a commodity that its price can be manipulated, that is, can be controlled by the creator of the corner; or (2) in the extreme situation, obtaining contracts requiring the delivery of more commodities than are available for delivery.''

[63] *See* CFTC Glossary, which defines a ''short'' as ''(1) [t]he selling side of an open futures contract; (2) a trader whose net position in the futures market shows an excess of open sales over open purchases.''

[64] *See* CFTC Glossary, which defines ''cover'' as ''(1) [p]urchasing futures to offset a short position (same as Short Covering); . . . (2) to have in hand the physical commodity when a short futures sale is made, or to acquire the commodity that might be deliverable on a short sale'' and offset as ''[l]iquidating a purchase of futures contracts through the sale of an equal number of contracts of the same delivery month, or liquidating a short sale of futures through the purchase of an equal number of contracts of the same delivery month.''

[65] *See* CFTC Glossary, which defines a ''squeeze'' as ''[a] market situation in which the lack of supplies tends to force shorts to cover their positions by offset at higher prices.''

[66] The primary silver traders in the Hunt family were Nelson Bunker Hunt, William Herbert Hunt, and Lamar Hunt.

[67] A group of individuals and firms trading through ContiCommodity Services, Inc. and ACLI International Commodity Services, Inc., both of which were FCMs.

and the Chicago Board of Trade (''CBOT'') imposed a series of emergency rules imposing at various times position limits, increased margin requirements, and trading for liquidation only on U.S. silver futures. It was the consensus view of staffs of the Commission, the Board of Governors of the Federal Reserve System, the Department of the Treasury and the Securities and Exchange Commission articulated in an interagency task force study of events in the silver market during that period that ''[r]easonable speculative position limits, if they had been in place before the buildup of large positions occurred, would have helped prevent the accumulation of such large positions and the resultant dislocations created when the holders of those positions stood for delivery.'' [68] That is, speculative position limits would have helped to prevent the buildup of the silver price spike of 1979–80. The Commission believes that this conclusion remains correct. ''Moreover, by limiting the ability of one person or group to obtain extraordinarily large positions, speculative limits diminish the possibility of accentuating price swings if large positions must be liquidated abruptly in the face of adverse price movements or for other reasons.'' [69]

The Hunt brothers were speculators [70] who neither produced, distributed, processed nor consumed silver. The corner began in early 1979, when the Hunt brothers accumulated large physical holdings of silver by purchasing silver futures and taking physical delivery of silver.[71] By the fall of 1979, they had accumulated over 43 million ounces of physical silver.[72] In addition to their physical holdings, in the fall of 1979 the Hunts and their cohorts held over 12 thousand contracts for March delivery, representing a potential future delivery to the hoard of another 60 million ounces of silver.[73] In general, the larger a position held by a trader, the greater is the potential that the position may affect the price of the contract. Throughout late 1979, the Hunts continued to stand for delivery and took care to ensure that their own holdings were not re-delivered back to them when outstanding futures contracts settled.[74] Thus, through this period, silver prices climbed as the Hunts accumulated more financial and physical positions and the available supply of silver decreased. As the interagency working group observed, ''[t]he biggest single source of the change in demand for silver bullion during the last half of 1979 and the first quarter of 1980 came from the silver acquisitions of Hunt family members and other large traders.'' [75]

The exchanges and regulators were slow to react to events in the silver market. However, to correct by then evident market imbalances, in late 1979 the CBOT introduced position limits of 3 million ounces of silver (*i.e.,* 600 contracts) per trader and raised margin requirements. Contracts over 3 million ounces were to be liquidated by February of 1980. On January 7, 1980, the larger COMEX instituted position limits of 10 million ounces of silver (*i.e.,* 2,000 contracts) per trader, with contracts over that amount to be liquidated by February 18. Then, on January 21, COMEX suspended trading in silver and announced that it would only accept liquidation orders. The price of silver began to decline. When the price of a commodity starts to move against the cornerer, attempts by the cornerer to sell would tend to fuel a further price move against the cornerer resulting in a vicious cycle of price decline. The Hunts were eventually unable to meet their margin calls and took a huge loss on their positions. The interagency working group concluded that the data relating to the episode ''support the hypothesis that the deliveries and potential deliveries to large long participants in the silver futures markets contributed to the rise and fall in silver prices in both the cash and futures markets. The rise appears to have been caused in part by the conversion of silver futures contracts to actual physical silver. The subsequent fall in prices was then exacerbated by the anticipated selling of some of the Hunt's physical silver by FCMs as well as the liquidation of Hunt group and possibly . . . [other large traders'] futures positions.'' [76]

Figure 1 illustrates the rapid rise and sharp decline in the price of silver during the period in question.[77] In January of 1979, the settlement price of silver was approximately $6.00 per troy ounce. By August, the price had risen to over $9.00, an increase of over 50 percent. Through most of October and November 1979, silver traded within a range of $15.00–$17.50 per troy ounce. On November 28, the closing price rose above $18.00. In December of 1979, the price rose above $30.00 and continued to climb until mid-January. On January 17, 1980, the closing price of silver reached its apex at $48.70 per troy ounce, more than five times the August price. On January 21, the price declined to $44.00; on January 22 the closing price slid to $34.00 per troy ounce. Through March 7, 1980, silver traded in an approximate range of $30.00–$40.00 per troy ounce. On March 10, silver closed below $30.00. On March 17 and 18, silver closed below $20.00. After a brief rebound above $22.00, by March 26 the price dropped to $15.80. On March 27, the price of silver hit a low of $10.80 per troy ounce, less than a quarter of the high of $48.70 two months earlier. ''After March 28, silver prices stabilized for a while in the $12–$15 range. . . . During April through December 1980, silver prices moved generally in a range between $12 and $20 per ounce.'' [78]

[68] Commodity Futures Trading Commission, Report To The Congress In Response To Section 21 Of The Commodity Exchange Act, May 29, 1981, Part Two, A Study of the Silver Market, at 173 (''Interagency Silver Study'').

[69] Speculative Position Limits, 45 FR 79831, 79833, Dec. 2, 1980.

[70] Speculators seek to profit by anticipating the price movement of a commodity in which a futures position has been established. *See* CFTC Glossary, which defines a speculator as, ''[i]n commodity futures, a trader who does not hedge, but who trades with the objective of achieving profits through the successful anticipation of price movements.'' In contrast, a hedger is ''[a] trader who enters into positions in a futures market opposite to positions held in the cash market to minimize the risk of financial loss from an adverse price change; or who purchases or sells futures as a temporary substitute for a cash transaction that will occur later. One can hedge either a long cash market position (e.g., one owns the cash commodity) or a short cash market position (e.g., one plans on buying the cash commodity in the future).'' The Hunts had no apparent industrial use for silver, although some attribute their early activities in the silver market to an attempt to hedge against Carter-era inflation and a defense against potential confiscation of precious metals in the event of a national crisis.

[71] Typically, delivery occurs in only a small percentage of futures transactions. The vast majority of contracts are liquidated by offsetting transactions.

[72] *See, e.g.,* Matonis, Jon, Hunt Brothers Demanded Physical Silver Delivery Too, available at *http://www.rapidtrends.com/hunt-brothers-demanded-physical-silver-delivery-too/*. To provide context, at this time COMEX and CBOT warehouses held 120 million ounces of silver.

[73] Interagency Silver Study at 18.

[74] It has been reported that they moved vast quantities of silver to warehouses in Switzerland to prevent this possibility.

[75] Interagency Silver Study at 77.

[76] Interagency Silver Study at 133.

[77] *See* CFTC Glossary, which defines ''spot price'' as ''[t]he price at which a physical commodity for immediate delivery is selling at a given time and place.'' The prompt month is the nearest month to the expiration date of a futures contract.

[78] Interagency Silver Study at 35–36.

Figure 1. Silver Prompt Month Prices (Source: Bloomberg)

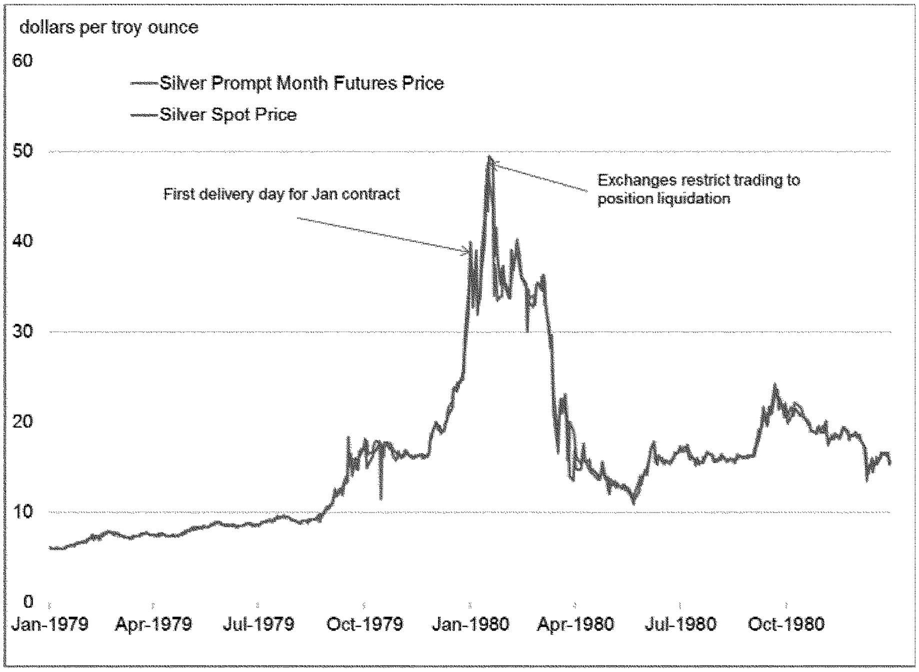
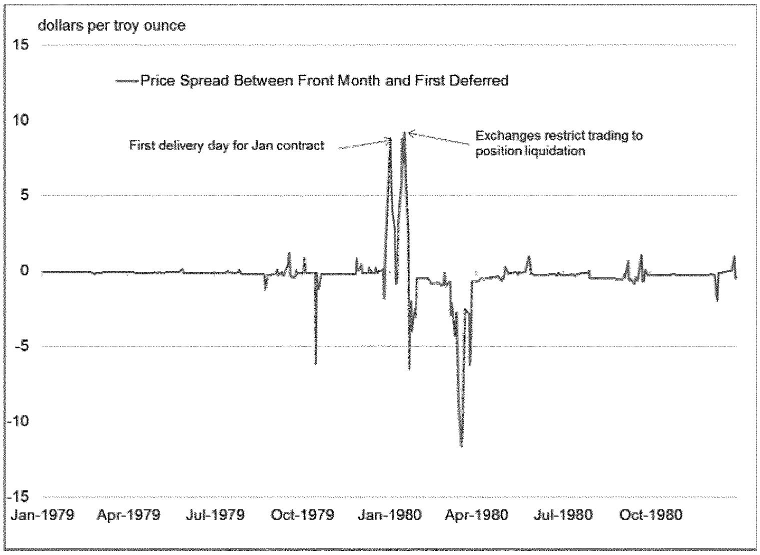


Figure 2 shows the distortion in the price of silver futures contracts due to the short squeeze during the run-up to the January 17 high and the effect of ''burying the corpse'' after the squeeze ended. In January 1980, due to the hoarding of the Hunts and their cohorts, physical supplies of silver were tight and the physical commodity was expensive to deliver. Scarcity in the physical market for silver distorted prices in the silver futures markets. The degree to which the value of the front month contract exceeded the value of other contracts was exaggerated. By April of 1980, because the Hunts and their cohorts were forced to sell, physical supply had increased and silver was comparatively cheaper to deliver. The front month contract was then worth substantially less than other contracts. In contrast, assuming equilibrium in production, use, and storage of silver, one would expect the charted price spreads to look comparatively much flatter. That is, there should not be that much difference between the price of the front month contract and other contracts because silver should not be subject to seasonality such as would affect crops. Moreover, because silver is relatively cheap to store, the difference in the price of the front month and other contracts should also be less sensitive to the cost of carry.

Figure 2. Silver 1st – 2nd Month Futures Spread (Source: Bloomberg)



The Hunt brothers silver episode demonstrates the burdens on interstate commerce of corners and squeezes.

In section 4a(a)(1) of the Act, Congress identifies ''sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity'' [79] as an indication that excessive speculation may be present in a market for a commodity. The rapid rise and sharp decline in the price of silver that commenced in August 1979 and was spent by the end of March 1980 certainly fits the description advanced by Congress. Nevertheless, the Commission, based on its experience and expertise, does not believe that the burdens on interstate commerce are limited solely to the temporary and unwarranted changes in price such as those exhibited during the silver price spike that resulted, at least in part, from the deliberate behavior of the Hunt brothers and their cohorts.[80] Indirect burdens on interstate commerce may arise as a result of unwarranted changes in price such as occurred in this case. Such burdens arise due to manipulation or attempted manipulation, or they may result from the excessive size and disorderly trading of a speculative, *i.e.,* non-hedging, position.

Sudden or unreasonable fluctuations or unwarranted changes in the price of a commodity derivative contract may be caused by a trader establishing, maintaining or liquidating an extraordinarily large position whether in a physical-delivery or cash-settled contract. Prices for commodity derivative contracts reflect expectations about the price of the underlying commodity at a future date and, thus, reflect expectations about supply and demand for that underlying commodity. In contrast, the supply of a commodity derivative contract itself is not limited to the supply of the underlying commodity. Rather, the supply of a commodity derivative contract is a function of the ability of a trader to induce a counterparty to take the opposite side of the transaction.[81] Thus, the capacity of the market (*i.e.,* all participants) to absorb purchase or sale orders for commodity derivative contracts is limited by the number of participants that are willing to provide liquidity, *i.e.,* take the other side of the order at a given price. For example, a trader that demands immediacy in establishing a long position larger than the amount of pending offers to sell by market participants may cause the commodity derivative contract price to increase, as market participants may demand a higher price when entering new offers to sell. It follows that an extraordinarily large position, relative to the size of other participants' positions, may cause an unwarranted price fluctuation.

In the spot month for a physical-delivery commodity derivative contract, concerns regarding sudden or unreasonable fluctuations or unwarranted changes in the price of that contract are heighted because open positions in such a contract either: Must be satisfied by delivery of the underlying commodity (which is of limited supply and, thus, susceptible to corners or squeezes); or must be offset before delivery obligations attach (that requires trading with another participant to offset the open position).[82] For example, a trader

[79] 7 U.S.C. 6a(a)(1).

[80] The Interagency Silver Study identified three main factors contributing to the price increases in silver at the time.

First, the state of the economy during the period in question affected all precious metals including silver. . . .

Second, changes in the supply and demand of physical silver affected the price of silver. . . .

Third, the accumulation of large amounts of both physical silver and silver futures by individuals such as the Hunt family of Dallas, Texas, had an effect on the price of silver directly and on the expectations of others who became aware of these actions.

Interagency Silver Study at 2.

[81] In a commodity derivative contract, the two parties to the contract have opposite positions. That is, for every long position in a commodity derivative contract held by one trader, there is a short position that another trader must hold.

[82] Regarding cash-settled commodity derivative contracts, there are a variety of methods for determining the final cash settlement price, such as by reference to (i) a survey price of cash market transactions, or (ii) the final (or daily) settlement price of a physical-delivery futures contract. For example, in the case of a trader who holds an extraordinarily large position in a cash-settled contract based on a survey of prices of cash market transactions, where the price of the spot month cash-settled contract is used by cash market participants in determining or setting their cash market transaction prices, then an unwarranted price fluctuation in that cash-settled commodity derivative contract could result in distorted prices in cash market transactions and, thus, an artificial

holding an extraordinarily large long position, absent position limits, could maintain a long position (requiring delivery beyond the limited supply of the physical commodity) deep into the spot month. By maintaining such an extraordinarily large position, such a trader may cause an unwarranted increase in the price of the commodity derivative contract, as holders of short positions attempt to induce a counterparty to offset their position.

Prices that deviate from the natural forces of supply and demand, *i.e.,* artificial prices, may occur when there is hoarding of a physical commodity in an attempted or perfected manipulative activity (such as a corner). If a price of a commodity is artificial, resources will be inefficiently allocated during the time that the artificial price exists. Similarly, prices that are unduly influenced by the size of a very large speculative position, or trading that increases or reduces the size of such very large speculative position, may lead to an inefficient allocation of resources to the extent that such prices do not allocate resources to their highest and best use. These burdens were present during the Hunt brothers episode. The Interagency Silver Study concluded that ''the volatile conditions in silver markets and the much higher price levels . . . affected the industrial and commercial sectors of the economy to a greater extent than would have been the case if silver price changes had been less turbulent.'' [83] The Interagency Silver Study described several negative consequences of resource misallocations that occurred during the silver price spike.

Significant changes took place in the use of silver as an industrial input during silver's price oscillation in 1979–80. In the photography industry, the consumption of silver from the first quarter of 1979 to the first quarter of 1980 fell by nearly one third. Similarly, the use of silver in the production of silverware declined by over one half in this period. In addition, numerous other uses of silver exhibited sharp usage declines equivalent to or in excess of these examples. These sharp reductions in silver use are indicative of the general disruption caused by the sharp rise in silver prices. Since the demand for silver in many of these uses is relatively price inelastic, the substantial decline registered in the use of silver for industrial purposes underscores the sizable magnitude of silver price increases and the consequent disruption experienced by the industry.

Individual commercial operations using silver were also disrupted. To illustrate, a major producer of X-ray film discontinued production purportedly as a result of the sharply increased and erratic behavior of the price of silver. In addition, there were reports that trading firms failed financially in early 1980 due to losses incurred in silver markets. Finally, the financial condition of small firms dependent on silver products (hearing aid batteries, printing supplies, etc.) deteriorated as a result of high silver prices and limited supplies.[84]

Moreover, after the settlement price of silver peaked in mid-January 1980, the ensuing ''rapid decline of silver prices subjected several FCMs and their parent companies to considerable financial stress.'' [85] In the view of the Commission and other regulators, ''[w]hile all FCMs carrying silver positions appear to have remained solvent during the period in question, the potential for insolvency was significant.'' [86] The Interagency Silver Study described a cascade of undesirable events;

> Falling prices reduced the equity in the accounts of some large, net long silver futures positions, necessitating margin calls. Responsibility for the financial obligations of some of these positions had to be assumed by FCMs when large margin calls went unmet. A significant proportion of the loans to major silver longs, collateralized by silver, had been made by some FCMs acting for their parent companies. A major portion of this collateral was rehypothecated for bank loans by these companies. The FCMs and their parent companies were thus exposed to two related problems that threatened them with insolvency—the losses on customer accounts and the possibility that silver prices would fall to a point which would cause the banks to demand payment on the hypothecated loans. . . . The FCM was not only vulnerable because of its customers' losses on the futures contracts, but also because of the potential for a decline in the value of loan collateral.[87]

The failure of an FCM with large silver exposures could have adversely affected clients without positions in silver and potentially other participants in the futures markets. The failure of a large FCM could have negatively affected the various exchanges and potentially the clearinghouses.[88] The solvency of FCMs and other Commission registrants crucial to properly functioning futures markets is clearly within the Commission's regulatory ambit. The failure of a commission registrant in the context of unwarranted price spikes would be a burden on interstate commerce.

Fallout from the silver price spike in late 1979-early 1980 extended beyond the silver markets. ''Banks, by extending credit for futures market activity while accepting silver as collateral, exposed themselves to higher than normal risks.'' [89] Unusual activity was also observed in other futures markets, such as precious metals and commodities other than silver in which the Hunts were thought to have had positions.[90] ''On March 27, 1980, the date on which the price of silver dropped to its lowest point, $10.80 an ounce, a combination of factors, including news of the Hunts' problems in meeting margin calls, the efforts of the Hunts to sell positions in various exchange-listed securities in order to meet those calls, and the actions of the SEC in suspending trading in Bache Group stock, appeared to have a direct impact on the securities markets.'' [91] Commenters noted the marked changes in the rate of inflation concomitant with the rapid rise and fall of the price of silver.[92] Potential bank

final cash settlement price from a survey of such distorted cash market transaction prices. Alternatively, for example, in the case of a trader who holds an extraordinarily large position in a cash-settled contract based on the final settlement price of a physical-delivery futures contract, then a trader has an incentive to mark the close of that physical-delivery futures contract to benefit her position in the cash-settled contract.

[83] *Id.* at 150.

[84] *Id.* (footnotes omitted). James M. Stone, formerly Chairman of the Commission, maintained that the negative effects of the price spike on commercials were borne out in employment figures: ''In the case of silver, the employment impacts fell hardest upon the makers of consumer products. According to the Department of Labor's Bureau of Labor Statistics some 6000 jobs in the jewelry, silverware and plateware industries were lost between November of 1979 and February of 1980.'' Additional Comments on the Interagency Silver Study at 9 (''Stone Comments'').

[85] *Id.* at 135.

[86] *Id.* at 140.

[87] *Id.* at 135–6 (footnote omitted).

[88] *See id.* at 140–41. ''Although the clearinghouses have contingency plans to deal with insolvent members, to date these plans have covered only the collapse of small FCMs. Conceivably, a major default could result in assessments of members that might, in turn, result in the insolvency of some members and the collapse of the exchange.''

[89] Interagency Silver Study at 145. ''Bank loans to major silver traders were made both directly and indirectly through FCMs. . . . Default on a major portion of these loans could have had a significant effect on the overall banking industry, but particularly on those banks where the loan concentration was the greatest.'' Testimony of Philip McBride Johnson, Chairman, Commodity Futures Trading Commission, Before the Subcommittee on Conservation, Credit and Rural Development, Committee on Agriculture, U.S. House of Representatives, Oct. 1, 1981, at 19 (''Johnson Testimony'').

[90] *See* Interagency Silver Study at 147–8. *See also* Johnson Testimony at 18–21.

[91] Interagency Silver Study at 148.

[92] *See* Stone Comments at 9; Johnson Testimony at 20. *Contra* Philip Cagan, ''Financial Futures

Continued

failures, disruptions in other futures markets, disruptions in the securities markets and volatile inflation rates would be additional burdens on interstate commerce. In highlighting the ability of market participants to accumulate extraordinarily large speculative positions, thereby demoralizing the silver markets to the injury of producers and consumers, the entirety of the Hunt brothers silver episode called into question the adequacy of futures regulation generally and the integrity of the futures markets.

The Commission believes that if Federal speculative position limits had been in effect that correspond to the limits that the Commission proposes now, across markets now subject to Commission jurisdiction, such limits would have prevented the Hunt brothers and their cohorts from accumulating such large futures positions.[93] Such large positions were associated with the sudden fluctuations in price shown in Figures 1 and 2. These unwarranted changes in price imposed an undue and unnecessary burden on interstate commerce, as described in greater detail on the preceding pages. If the Hunt brothers had been prevented from accumulating such large futures positions, they would not have been able to demand delivery on such large futures positions. The Hunts therefore would have been unable to hoard as much physical silver. The Commission's belief is based on the following assessment:

In order to approximate a single-month and all-months-combined limit calculated using a methodology similar to that proposed in this release[94] for silver during this time period, the Commission used data regarding month-end open contracts from the Interagency Silver Study.[95] These month-end open interest reports are for all silver futures combined for the Chicago Board of Trade and the Commodity Exchange in New York.[96] Table 1 shows the month-end open interest for all silver futures combined from August 1979 to April 1980. Using these numbers, the average month-end open interest for this period is 190,545 contracts, and applying the 10, 2.5 percent formula to this average would result in single-month and all-months-combined limits of 6,700 contracts. The Hunts would have exceeded this single-month limit in the fall of 1979 when they and their cohorts held over 12,000 contracts for March delivery.[97] In addition, the Hunts and their cohorts held net positions in silver futures on COMEX and CBOT that exceeded the calculated all-months-combined limits on multiple occasions between September 1975 and February 1980 as is shown in Table 2. Hence, if the proposed rule had been in place, it could have limited the size of the positions held by the Hunts and their cohorts as early as the autumn of 1975.

There are two limitations to the data used in this analysis. First, the month-end open interest data do not include open interest from the MidAmerica Commodity Exchange. Second, the month-end open interest numbers are for a short time-period starting at the end of August 1979. If the proposed rule had been in place at the time of the Hunt brothers price spike, the limits would have been calculated using data from two years and would likely have used data from an earlier period which could have caused the limit levels to be different. However, the Commission believes that the calculated limits are a fair approximation of the limits that would have applied during this time period. Moreover, for speculative position limits not to have constrained the Hunts at the end of 1975 when their net position was reported as 15,876 contracts, the average total open interest for the time period would have had to be over 500,000 contracts (of 5,000 troy ounces). Moreover, the average total open interest would have had to be over 900,000 contracts (of 5,000 troy ounces) before the all-months-combined limit would have exceeded the maximum net position reported by the Interagency Silver Study (24,722 for September 30, 1979). According to the Interagency Silver Study, it was at this point that the Hunts began acquiring large quantities of physical silver.[98]

TABLE 1—MONTH-END OPEN INTEREST FOR CHICAGO BOARD OF TRADE (CBOT) AND THE COMMODITY EXCHANGE (COMEX), AUGUST 1979 THROUGH APRIL 1980, ALL SILVER FUTURES COMBINED[99]

Date	CBOT open interest	COMEX open interest	Total open interest
8/31/1979	185,031	157,952	342,983
9/30/1979	161,154	167,723	328,877
10/31/1979	105,709	145,611	251,320
11/30/1979	98,009	134,207	232,216
12/31/1979	93,748	127,225	220,973
1/31/1980	49,675	77,778	127,453
2/29/1980	28,211	63,672	91,884
3/31/1980	24,336	48,688	73,024
4/30/1980	19,008	27,166	46,174

Markets: Is More Regulation Needed?,'' I J. Futures Markets 169, 181–82 (1981).

[93] *See also* Speculative Position Limits, 45 FR 79831, 79833, Dec. 2, 1980 (''Had limits on the amount of total open commitments which any trader or group can own been in effect, such occurrences may have been prevented.'').

[94] The formula for the non-spot-month position limits is based on total open interest for all Referenced Contracts in a commodity. The actual position limit level will be set based on a formula: 10 percent of the open interest for the first 25,000 contracts and 2.5 percent of the open interest thereafter. The 10, 2.5 percent formula is identified in 17 CFR 150.5(c)(2).

[95] Interagency Silver Study at 117.

[96] During the time of the events discussed, silver bullion futures contracts traded in the United States on the COMEX in New York, the CBOT in Chicago, and the MidAmerica Commodity Exchange (''MCE'') in Chicago. At this time, the COMEX and CBOT contracts were each 5,000 troy ounces of silver, and MCE's contract was 1,000 troy ounces. Month-end open interest numbers were not available for MCE.

[97] *See* discussion below.

[98] Interagency Silver Study at 104.

[99] *Id.* at 117.

TABLE 2—ESTIMATED OWNERSHIP OF SILVER BY HUNT RELATED ACCOUNTS

[Contracts of 5,000 troy ounces][100]

Date	Net futures COMEX	Net futures CBOT	Futures total (from table)
9/30/1975	6,917	4,560	11,077
12/31/1975	6,865	9,011	15,876
3/31/1976	6,092	5,324	11,416
6/30/1976	4,061	(920)	3,141
9/30/1976	3,890	578	4,468
12/31/1976	3,910	571	4,481
3/31/1977	3,288	259	3,547
6/30/1977	4,540	816	5,356
9/30/1977	5,277	1,518	6,795
12/31/1977	5,826	2,016	7,344
3/31/1978	6,459	2,224	8,683
6/30/1978	4,200	2,451	6,651
9/30/1978	2,481	3,047	5,528
12/31/1978	4,076	1,317	5,393
3/31/1979	6,655	1,699	8,354
5/31/1979	8,712	4,765	13,477
6/30/1979	9,442	3,846	13,288
7/31/1979	10,407	4,336	14,743
8/31/1979	14,941	8,700	23,641
9/30/1979	15,392	9,330	24,722
10/31/1979	11,395	7,444	18,839
11/30/1979	12,379	5,693	18,072
12/31/1979	13,806	5,921	19,727
1/31/1980	7,432	1,344	8,776
2/29/1980	6,993	789	7,782
4/2/1980	1,056	388	1,444

The Commission finds that if the position limits suggested by this data were applied as early as 1975, the Hunts would not have been able to accumulate or hold their excessively large futures positions and thereby the limits would have restricted their ability to cause the price fluctuations and other harms described above.

Position limits would help to diminish or prevent unreasonable fluctuations or unwarranted changes in the price of a commodity, such as the extreme price volatility in the 2006 natural gas markets.[101]

Amaranth Advisors L.L.C. (''Amaranth'') was a hedge fund that, until its spectacular collapse in September 2006, held ''by far the largest positions of any single trader in the 2006 U.S. natural gas financial markets.''[102] Amaranth's activities are a classic example of the market power that often typifies excessive speculation. ''Market power'' in this context means the ability to move prices by exerting outsize influence on expectations of supply and/or demand for a commodity. Amaranth accumulated such large speculative natural gas futures positions that it affected expectations of demand for physical natural gas and prices rose to levels not warranted by the otherwise natural forces of supply and demand for the commodity.[103]

''Prior to its collapse, Amaranth dominated trading in the U.S. natural gas market. . . . All but a few of the largest energy companies and hedge funds consider trades of a few hundred contracts to be large trades. Amaranth held as many as 100,000 natural gas futures contracts at once, representing one trillion cubic feet of natural gas, or 5% of the natural gas used in the United States in a year. At times, Amaranth controlled up to 40% of all of the open interest on NYMEX for the winter months (October 2006 through March 2007). Amaranth accumulated such large positions and traded such large volumes of natural gas futures that it distorted market prices, widened price spreads, and increased price volatility.''[104]

Natural gas is one of the main sources of energy for the United States. The price of natural gas has a pervasive effect throughout the U.S. economy. In general, ''[b]ecause one of the major uses of natural gas is for home heating, natural gas demand peaks in the winter month and ebbs during the summer months.''[105] During the summer months, when demand for physical natural gas falls, the spot price of natural gas tends to fall, with the excess physical supply being placed into underground storage reservoirs for future use. During the winter, when demand for natural gas exceeds production and the spot price tends to increase, natural gas is removed from

[100] *Id.* at 103.

[101] For purposes of discussion, the following section recounts certain findings about the 2006 natural gas markets by the staff of the Permanent Subcommittee on Investigations of the United States Senate (the ''Permanent Subcommittee''). *See generally* Excessive Speculation in the Natural Gas Market, Staff Report with Additional Minority Staff Views, Permanent Subcommittee on Investigations, United States Senate, Released in Conjunction with the Permanent Subcommittee on Investigations, June 25 & July 9, 2007 Hearings (''Subcommittee Report''). Separately, the Commission, on July 25, 2007, charged Amaranth Advisors LLC, Amaranth Advisors (Calgary) ULC and its former head energy trader, Brian Hunter, with attempted manipulation in violation of the Commodity Exchange Act. The charges against the Amaranth entities were later settled, with a fine of $7.5 million levied against them in August of 2009. *See* U.S. Commodity Futures Trading Commission Charges Hedge Fund Amaranth and its Former Head Energy Trader, Brian Hunter, with Attempted Manipulation of the Price of Natural Gas Futures, July 25, 2007, available at *http://www.cftc.gov/PressRoom/PressReleases/pr5359-07*; Amaranth Entities Ordered to Pay a $7.5 Million Civil Fine in CFTC Action Alleging Attempted Manipulation of Natural Gas Futures Prices, August 12, 2009, available at *http://www.cftc.gov/PressRoom/PressReleases/pr5692-09*. The Commission enforcement action is still pending against Brian Hunter. The discussion herein of the natural gas events and Subcommittee Report shall not be construed to alter any statements by or positions of the Commission and its staff in the pending enforcement matter.

[102] Subcommittee Report at 67.

[103] Amaranth was a pure speculator that, for example, could neither make nor take delivery of physical natural gas.

[104] Subcommittee Report at 51–52.

[105] Subcommittee Report at 17.

underground storage and is consumed.[106]

Amaranth believed that winter natural gas prices would be much higher than summer natural gas prices, notwithstanding an abundant supply of natural gas in 2006. Seeking to profit from this view, Amaranth engaged in spread trading: it bought contracts for future delivery of natural gas in months where it thought prices would be relatively higher and sold contracts for future delivery of natural gas in months were it thought prices would be relatively lower.[107] Amaranth primarily traded the January/November spread and the March/April spread, although it took positions in other near months. When Amaranth bet that the spread between the two contracts would increase, it would make money by selling out of the position or the equivalent underlying legs at a higher price than it paid. Amaranth's positions were extremely large.[108] The Permanent Subcommittee found that ''Amaranth's large positions and trades caused significant price movements in key natural gas futures prices and price relationships.'' [109] The Permanent Subcommittee also found that ''Amaranth's trades were not the sole cause of the increasing price spreads between the summer and winter contracts; rather they were the *predominant* cause.'' [110]

Events in the 2006 natural gas markets demonstrate the burdens on interstate commerce of extreme price volatility.

In section 4a(a)(1) of the CEA Congress causally links excessive speculative positions with ''sudden or unreasonable fluctuations or unwarranted changes in the price of'' such commodities. The precipitous decline in natural gas prices from late-August 2006 until Amaranth's collapse in September 2006 demonstrates that link. The Permanent Subcommittee found that ''[p]urchasers of natural gas during the summer of 2006 for delivery in the following winter months paid inflated prices due to Amaranth's speculative trading'' and that ''[m]any of these inflated costs were passed on to consumers, including residential users who paid higher home heating bills.'' [111] Such inflated costs are clearly a burden on interstate commerce. In the words of the Permanent Subcommittee, ''[t]he Amaranth experience demonstrates how excessive speculation can distort prices of futures contracts that are many months from expiration, with serious consequences for other market participants.'' [112] The Permanent Subcommittee findings support the imposition of speculative position limits outside the spot month. Commercial participants in the 2006 natural gas markets were reluctant or unable to hedge.[113] Speculators withdrew liquidity from a market viewed as artificially expensive.[114] To relieve the burdens on interstate commerce posed by positions as large as Amaranth's, Congress directed the Commission to set position limits to, among other things, ensure sufficient market liquidity for bona fide hedgers.[115]

''Amaranth held as many as 100,000 natural gas contracts in a single month, representing 1 trillion cubic feet of natural gas, or 5% of the natural gas in the entire United States in a year. At times Amaranth controlled 40% of all of the outstanding contracts on NYMEX for natural gas in the winter season (October 2006 through March 2007), including as much as 75% of the outstanding contracts to deliver natural gas in November 2008.'' [116] Position limits that would prevent the accumulation of such overly large speculative positions in deferred commodity contracts would help to prevent unreasonable fluctuations or unwarranted changes in the price of a commodity that may occur when a speculator must substantially reduce its position within a short period of time to the extent the price of such commodity during the unwind period does not reflect fundamental values.[117] Moreover, position limits would help to prevent disruptions to market integrity caused by the corrosive perception that a market is unfair or prices in a market do not reflect the fundamental forces of supply and demand as occurred during 2006 in the natural gas markets. Commodity markets where artificial volatility discourages participation are less likely to produce ''a market consensus on correct pricing.'' [118]

Based on certain assumptions described below, the Commission believes that if Federal speculative position limits had been in effect that correspond to the limits that the Commission proposes now, across markets now subject to Commission jurisdiction, such limits would have prevented Amaranth from accumulating such large futures positions and thereby restrict its ability to cause unwarranted price effects. Using non-public data reported to the Commission under Part 16 of the Commission's regulations for open interest [119] for natural gas contracts, the Commission calculated the single-month and all-months-combined limits using the same methodology as proposed in this release for the period January 1, 2004 to December 31, 2005. The results of this analysis are presented in Table 3 below, which shows that the resulting single-month and all-months combined limits would have each been 40,900 contracts.

[106] *See id.*

[107] Amaranth sought to benefit from changes in the price relationship between two linked contracts. For instance, if a trader is long the front month at 10 and short the back month at 8, the spread is 2. If the price of the front month contract rises to 11, the spread is 3 and the position has a gain. If the price of the back month contract declines to 7, the spread is 3 and the position has a gain. If the price of the front month contract rises to 11 and the price of the back month contract declines to 7, the spread is 4 and the position has a gain. But if the front month contract falls to 8 and the back month contract falls to 6, the spread does not change.

[108] ''Amaranth also held large positions in other winter and summer months spanning the five-year period from 2006–2010. In aggregate, Amaranth amassed an extraordinarily large share of the total open interest on NYMEX. During the spring and summer of 2006, Amaranth controlled between 25 and 48% of the outstanding contracts (open interest) in all NYMEX natural gas futures contracts for 2006; about 30% of the outstanding contracts (open interest) in all NYMEX natural gas futures contracts for 2007; between 25 and 40% of the outstanding contracts (open interest) in all NYMEX natural gas futures contracts for 2008; between 20 and 40% of the outstanding contracts (open interest) in all NYMEX natural gas futures contracts for 2009; and about 60% of the outstanding contracts (open interest) in all NYMEX natural gas futures contracts for 2010.'' Subcommittee Report at 52.

[109] Subcommittee Report at 2.

[110] *Id.* at 68 (emphasis in original).

[111] Id. at 6.

[112] *Id.* at 4.

[113] *See id.* at 114.

[114] *See id.* at 71–77.

[115] 7 U.S.C. 6a(a)(3)(B)(iv).

[116] Subcommittee Report at 2.

[117] This is because, among other things, the speculator's influence on expectations of demand is reduced as the speculator is no longer willing and able to hold such a large net position in futures contracts.

[118] Subcommittee Report at 119.

[119] *See* 17 CFR 16.01.

TABLE 3—OPEN INTEREST AND CALCULATED LIMITS FOR NYMEX NATURAL GAS JANUARY 1, 2004, TO DECEMBER 31, 2005

Core referenced futures contract	Year	Open interest (daily average)	Open interest (month end)	Limit (daily average)	Limit (month end)	Limit
NYMEX Natural Gas	2004	851,763	839,330	23,200	22,900	40,900
	2005	1,559,335	1,529,252	40,900	40,200	....

Using non-public data reported to the Commission under Part 17 of the Commission's regulation for large trader positions,[120] the Commission also calculated Amaranth's positions [121] as they would be calculated under the proposed rule for the period January 1, 2005 to September 30, 2006. During this time, Amaranth's net position would have exceeded the limits for the single month and for all-months-combined on multiple days, starting as early as June 2006. It is important to note that ICE did not report market open interest for its swap contracts or for large traders to the Commission during this time period, so the Commission cannot exactly replicate the calculations in the proposed rule. However, even if ICE had the same amount of open interest in futures-equivalent terms as all of the NYMEX natural gas contracts listed in 2005,[122] the calculated limit would be 79,900 contracts. According to the Subcommittee Report, Amaranth would have exceeded this limit at the end of July 2006 with its holding of 80,000 long contracts in the January 2007 delivery month.[123] Moreover, the Subcommittee Report also shows that Amaranth tended to trade in the same direction for the same delivery month on ICE and NYMEX. Hence, the Commission believes that had the proposed rule been in effect in 2006, Amaranth would not have been able to build such large positions in natural gas futures and swaps and thereby limits would have restricted Amaranth's ability to cause harmful price effects that limits are intended to prevent.[124]

Position limits would prevent the accumulation of extraordinarily large positions that could potentially cause unreasonable price fluctuations even in the absence of manipulative conduct.

As the above examples illustrate, position limits are vital tools to prevent the accumulation of speculative positions that can enable market manipulation. But these examples also show that limits are necessary to achieve a broader statutory purpose — to prevent price distortions that can potentially occur due to excessively large speculative positions even in the absence of manipulative conduct.

The text of section 4a(a)(1) of the Act itself establishes its broader purpose: It authorizes limits as the Commission finds are necessary to prevent price distortions that can potentially occur due to excessive speculation (*i.e.* excessively large speculative positions), without regard to whether it is manipulative.[125] The Commission has long interpreted the provision as authorizing limits to achieve this broader purpose and it has long found that limits are necessary to do so.

For example, in the 1981 Rule requiring exchanges to set limits for all commodities, noted above, the Commission found that ''historical and current reason for imposing position limits on individual contracts is to prevent unreasonable fluctuations or unwarranted changes in the price of a commodity which may occur by allowing any one trader or group of traders acting in concert to hold extraordinarily large futures positions.'' [126] In a 2010 rulemaking, the Commission stated that ''[f]rom the earliest days of federal regulation of the futures markets, Congress made it clear that unchecked speculative positions, even without intent to manipulate the market, can cause price disturbances. To protect markets from the adverse consequences associated with large speculative positions, Congress expressly authorized the [Commission] to impose speculative position limits prophylactically.'' [127]

The Commission reiterated this view before Congress in 1982 in opposing industry amendments to the CEA that would have required that limits are necessary to prevent manipulation, corners or squeezes. Former Commission Chair Philip McBride Johnson told Congress that position limits were ''predicated on several different sections of the Commodity Exchange Act which pertain to orderly markets and the terms 'manipulation, corners or squeezes' refer to only one class of market disruption which the limits established under this rule are intended to diminish or prevent. For instance, CEA section 4a contains the Congressional finding that excessive speculation in the futures markets can cause sudden or unreasonable fluctuations or unwarranted changes in the price of commodities. Accordingly, a requirement that the Commission make the suggested finding concerning 'manipulation, corners, or squeezes' prior to requiring a contract market to establish speculative limits could significantly restrict the application of the current rule and undermine its more comprehensive regulatory purpose of preventing excessive speculation which arises from extraordinarily large positions.'' [128]

Congress effectively ratified the Commission's interpretation in 1982. As it explained: ''the Senate Committee decided to retain [CEA section] 4a language concerning the burden which excess speculation places on interstate commerce. This was due to the Committee's belief that speculative limits, in addition to their role in preventing manipulations, corners, or squeezes, are also important regulatory tools for preventing unreasonable fluctuations or unwarranted changes in commodity prices that may arise even in the absence of manipulation.'' [129]

The Commission has long found and again finds, based on its experience, that unchecked speculative positions can potentially disrupt markets. In general, the larger a position held by a trader, the greater is the potential that the position may affect the price of the contract. The Commission reaffirms that, ''the capacity of any contract to absorb the

[120] *See* 17 CFR 17.00.

[121] Because the Commission's calculations are based on non-public information, the results of this analysis may be different from calculations based on publicly available information, including information contained in the Subcommittee Report.

[122] Since the main natural gas swap contracts on ICE are one quarter of the size of the NYMEX Henry Hub Natural Gas Futures contract, this would mean that the open interest for natural gas contracts on ICE would have to be four times the open interest for natural gas contracts on NYMEX.

[123] *See* Subcommittee Report at 79.

[124] According to the Subcommittee Report, Amaranth reduced its positions on NYMEX as directed by NYMEX in August 2006, and at the same time, increased its corresponding positions on ICE. *See* Subcommittee Report at 97–98.

[125] *See* 7 U.S.C. 6a(a)(1).

[126] 46 FR 50938, 50939, Oct. 16, 1981.

[127] 75 FR 4144, 4145–46, Jan. 26, 2010.

[128] Futures Trading Act of 1982: Hearings on S. 2109 before the S. Subcomm. on Agricultural Research, 97th Cong. 44 (1982).

[129] S. Rep. 97–384 at 45 (1982).

establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, *i.e.,* the capacity of the market is not unlimited.'' [130] When positions exceed the capacity of markets to absorb and liquidate them, unreasonable price fluctuations and volatility can potentially occur. ''[B]y limiting the ability of one person or group to obtain extraordinarily large positions, speculative limits diminish the possibility of accentuating price swings if large positions must be liquidated abruptly in the face of adverse price movements or for other reasons.'' [131] As former Commission Chair McBride Johnson explained to Congress regarding the silver crisis: ''It seems clear from the silver crisis that the orderly imposition of speculative limits before a crisis develops is one of the more promising means of solving such difficulties in the future . . . .'' [132] This statement is equally true of the natural gas events of 2006. Had the Hunt brothers and Amaranth been prevented from amassing extraordinarily large speculative positions in the first place, their ability to cause unwarranted price fluctuations and volatility and other harmful market effects attributable to such positions would have been restricted.

The Commission requests comment on all aspects of this section.

Studies and Reports

In addition to those cited previously, the Commission has reviewed and evaluated additional studies and reports (collectively, ''studies'') about various issues relating to position limits. A list of studies that the Commission has reviewed is in appendix A to this preamble.

Some studies discuss whether or not excessive speculation exists, the definition of excessive speculation, and/or whether excessive speculation has a negative impact on derivatives markets.[133] Those studies that do generally discuss the impact of position limits do not address or provide analysis of how the Commission should specifically implement position limits under section 4a of the CEA.[134] Some studies may be read to support the imposition of Federal speculative position limits; others suggest that speculative position limits will be ineffective; still others assert that imposing speculative position limits will be harmful. There is a demonstrable lack of consensus in the studies.

Many of the studies were focused on the impact of speculative activity in futures markets, *e.g.,* how the behavior of non-commercial traders affected price levels. Such studies did not provide a view on position limits in general or on the Commission's implementation of position limits in particular. Some studies have found little or no evidence of excessive speculation unduly moving prices,[135] while others conclude there is significant evidence of the impact of speculation in commodity markets.[136] Even studies that questioned whether speculation affects prices were often equivocal.[137] Still other studies have determined that while speculation may not cause a price movement, such activity may increase price pressures, thereby exacerbating the price movement.[138]

Several studies did generally address the concept of position limits as part of their discussion of speculative activity. The authors of some of these works expressed views that speculative position limits were an important regulatory tool and that the CFTC should implement limits to control excessive speculation.[139] For example,

[130] 46 FR 50938, Oct. 16, 1981 (adopting then § 1.61 (now part of § 150.5)).

[131] 45 FR at 79833.

[132] Futures Trading Act of 1982: Hearings on S. 2109 before the S. Subcomm. on Agricultural Research, 97th Cong. 44 (1982).

[133] 76 FR at 71663.

[134] *Id.* at 71664.

[135] *See, e.g.,* Harris, Jeffrey and Buyuksahin, Bahattin, ''The Role of Speculators in the Crude Oil Futures Market,'' June 16, 2009, at 2, 19 (''We find that the changing net positions of no specific trader groups lead to price changes . . . .'' and ''we fail to find the causality from these [speculative] traders' positions to prices.''); Byun, Sungje, ''Speculation in Commodity Futures Market, Inventories and the Price of Crude Oil,'' January 17, 2013, at 3, 33 (noting that '' . . . evidence among researchers is inconsistent'' but that ''we conclude there does not exist sufficient evidence on the potential contribution of financial investors in the crude oil market.''); Irwin, Scott H.; Sanders, Dwight R.; and Merrin, Robert P., ''Devil or Angel: The Role of Speculation in the Recent Commodity Price Boom,'' August 1, 2009, at 17 (''There is little evidence that the recent boom and bust in commodity prices was driven by a speculative bubble . . . Economic fundamentals, as usual, provide a better explanation for the movements in commodity prices.'').

[136] *See, e.g.,* Singleton, Kenneth J., ''Investor Flows and the 2008 Boom/Bust in Oil Prices,'' March 23, 2011, at 2–3 (Singleton presents '' . . . new evidence that . . . there were economically and statistically significant effects of investor flows on futures prices.''); Tang, Ke and Xiong, Wei, ''Index Investment and Financialization of Commodities,'' November 1, 2012, at 72 (''As a result of the financialization process, the price of an individual commodity is no longer determined solely by its supply and demand. Instead, prices are also determined by the aggregate risk appetite for financial assets and the investment behavior of diversified commodity index investors.''); Manera, Matteo, Nicolini, Marcella, and Vignati, Ilaria, ''Futures Price Volatility in Commodities Markets: The Role of Short-Term vs Long-Term Speculation,'' April 1, 2013, at 15 (''We find that speculation significantly affects the volatility of returns, although in contrasting ways. The scalping index has a positive and significant coefficient in the variance equation, suggesting that short term speculation has a positive impact on volatility.'').

[137] *Compare* Technical Committee of the International Organization of Securities Commissions, Task for on Commodity Futures Markets Final Report, March 1, 2009, at 3 (''economic fundamentals, rather than speculative activity, are a plausible explanation for recent price changes in commodities'') *with id.* at 8 (''short term expectations can be influenced by sentiment and investor behavior, which can amplify short-term price fluctuations, as in other asset markets''). Another study opining that speculative activity in general may reduce volatility nevertheless conceded that the authors could not rule out the possibility that a single trader might implement strategies that move prices and increase volatility. Brunetti, Celso and Buyuksahin, Bahattin, ''Is Speculation Destabilizing?,'' April 22, 2009, at 4, 22–23; *see also* Irwin, *et al.,* ''The Performance of CBOT Corn, Soybean, and Wheat Futures Contracts after Recent Changes in Speculative Limits,'' July 29, 2007, at 1, 6 (concluding that there was ''no *large* change in'' price volatility after speculative limits were increased, but cautioning that ''[w]ith limited observations available for the period following the change in speculative limits . . . , conclusions about the impact on volatility are tentative. Additional observations will be required across varying scenarios of supply, demand, and price level, to have full confidence in the conclusions.'') (emphasis added); Parsons, John E., ''Black Gold & Fool's Gold: Speculation in the Oil Futures Market,'' September 1, 2009, at 108 (position limits will not prevent asset bubbles from forming, but they are ''necessary to insure the integrity of the market'').

[138] *See, e.g.,* Hamilton, James D., ''Causes and Consequences of the Oil Shock of 2007–08,'' April 1, 2009, at 258 (Hamilton raises ''the possibility that miscalculation of the long-run price elasticity of oil demand . . . was one factor in the oil shock of 2007–2008, and that speculative investing in oil futures may have contributed to that miscalculation.''); Juvenal, Luciana and Petrella, Ivan, ''Speculation in the Oil Market,'' June 1, 2012, (''While global demand shocks account for the largest share of oil price fluctuations, speculative shocks are the second most important driver.'').

[139] *See, e.g.,* Greenberger, Michael, ''The Relationship of Unregulated Excessive Speculation to Oil Market Price Volatility,'' January 1, 2010, at 11 (On position limits: ''The damage price volatility causes the economy by needlessly inflating energy and food prices worldwide far outweighs the concerns about the precise application of what for over 70 years has been the historic regulatory technique for controlling excessive speculation in risk-shifting derivative markets.''.); Khan, Mohsin S., ''The 2008 Oil Price ''Bubble'','' August 2009, at 8 (''The policies being considered by the CFTC to put aggregate position limits on futures contracts and to increase the transparency of futures markets are moves in the right direction.''); U.S. Senate Permanent Subcommittee on Investigations, ''Excessive Speculation in the Wheat Market,'' June 2009, at 12 (''The activities of these index traders constitute the type of excessive speculation the CFTC should diminish or prevent through the imposition and enforcement of position limits as intended by the Commodity Exchange Act.''); U.S. Senate Permanent Subcommittee on Investigations, ''Excessive Speculation in the Natural Gas Market,'' June 25, 2007, at 8 (The Subcommittee recommended that Congress give the CFTC authority over ECMs, noting that ''[to] ensure fair energy pricing, it is time to put the cop back on the beat in all U.S. energy commodity markets.''); United Nations Conference on Trade and Development, ''The Global Economic Crisis: Systemic Failures and Multilateral Remedies,'' March 1, 2009, at 14, (The UNCTAD recommends that '' . . . regulators should be enabled to

one author opined that '' . . . strict position limits should be placed on individual holdings, such that they are not manipulative.'' [140] Another stated, ''[s]peculative position limits worked well for over 50 years and carry no unintended consequences. If Congress takes these actions, then the speculative money that flowed into these markets will be forced to flow out, and with that the price of commodities futures will come down substantially. Until speculative position limits are restored, investor money will continue to flow unimpeded into the commodities futures markets and the upward pressure on prices will remain.'' [141] The authors of one study claimed that ''[r]ules for speculative position limits were historically much stricter than they are today. Moreover, despite rhetoric that imposing stricter limits would harm market liquidity, there is no evidence to support such claims, especially in light of the fact that the market was functioning very well prior to 2000, when speculative limits were tighter.'' [142]

Not all of the reviewed studies viewed position limits in a positive light. One study claimed that position limits will not restrain manipulation,[143] while another argued that position limits in the agricultural commodities have not significantly affected volatility.[144] Another study noted that while position limits are effective as an anti-manipulation measure, they will not prevent asset bubbles from forming or stop them from bursting.[145] A study cautioned that while limits may be effective in preventing manipulation, they should be set at an optimal level so as to not harm the affected markets.[146] Another study claimed that position limits should be administered by DCMs, as those entities are closest to and most familiar with the intricacies of markets and thus can implement the most efficient position limits policy.[147] Another study suggested eliminating position limits, arguing that increasing ex-post penalties for manipulation would be more effective at deterring manipulative behavior.[148] One study noted the similar efforts under discussion in European markets.[149]

Studies that militate against imposing any speculative position limits appear to conflict with the Congressional mandate (discussed above) that the Commission impose limits on futures contracts, options, and certain swaps for agricultural and exempt commodities. Such studies also appear to conflict with Congress' determination, codified in CEA section 4a(a)(1), that position limits are an effective tool to address excessive speculation as a cause of sudden or unreasonable fluctuations or unwarranted changes in the price of such commodities.[150]

In any case, these studies overall show a lack of consensus regarding the impact of speculation on commodity markets and the effectiveness of position limits. While there is not a consensus, the fact that there are studies on both sides, in the Commission's view, warrants erring on the side of caution. In light of the Commission's experience with position limits, and its interpretation of congressional intent, it is the Commission's judgment that position limits should be implemented as a prophylactic measure, to protect against the potential for undue price fluctuations and other burdens on commerce that in some cases have been at least in part attributable to excessive speculation.

In this regard, the Commission has found two studies of actual market events to be helpful and persuasive in making its alternative necessity finding.[151] The first is the inter-agency report on the silver crisis.[152] This report, by a joint task force of the staffs of the Commission, the Board of Governors of the Federal Reserve System, the Department of the Treasury and the Securities and Exchange Commission, provides an in-depth description and analysis of the silver crisis, the Hunt brothers' build-up of massive positions, the manipulative

intervene when swap dealer positions exceed speculative position limits and may represent 'excessive speculation'.); United Nations Conference on Trade and Development, ''The Financialization of Commodity Markets,'' July 1, 2009, at 26 (The report recommends tighter restrictions, notably closing loopholes that allow potentially harmful speculative activity to surpass position limits.).

[140] de Schutter, Olivier, ''Food Commodities Speculation and Food Price Crises,'' September 1, 2010, United Nations Special Report on the Right to Food, at 8.

[141] Masters, Michael and White, Adam, ''The Accidental Hunt Brothers: How Institutional Investors are Driving up Food and Energy Prices,'' July 31, 2008, at 3.

[142] Medlock, Kenneth and Myers Jaffe, Amy, ''Who is In the Oil Futures Market and How Has It Changed?,'' August 26, 2009, Baker Institute for Public Policy, at 8.

[143] Ebrahim, Muhammed and Rhys ap Gwilym, ''Can Position Limits Restrain Rogue Traders?,'' March 1, 2013, Journal of Banking & Finance, at 27 (''. . . binding constraints have an unintentional effect. That is, they lead to a degradation of the equilibria and augmenting market power of Speculator in addition to other agents. We therefore conclude that position limits are not helpful in curbing market manipulation. Instead of curtailing price swings, they could exacerbate them.'').

[144] Irwin, Scott H.; Garcia, Philip; and Good, Darrel L., ''The Performance of CBOT Corn, Soybean, and Wheat Futures Contracts after Recent Changes in Speculative Limits,'' July 29, 2007, at 16 (''The analysis of price volatility revealed no large change in measures of volatility after the change in speculative limits. A relatively small number of observations are available since the change was made, but there is little to suggest that the change in speculative limits has had a meaningful overall impact on price volatility to date.'').

[145] Parsons, John E., ''Black Gold & Fool's Gold: Speculation in the Oil Futures Market,'' September 1, 2009, at 30 (''Restoring position limits on all nonhedgers, including swap dealers, is a useful reform that gives regulators the powers necessary to ensure the integrity of the market. Although this reform is useful, it will not prevent another speculative bubble in oil. The general purpose of speculative limits is to constrain manipulation . . . Position limits, while useful, will not be useful against an asset bubble. That is really more of a macroeconomic problem, and it is not readily managed with microeconomic levers at the individual exchange level.'').

[146] Wray, Randall, ''The Commodities Market Bubble: Money Manager Capitalism and the Financialization of Commodities,'' October 1, 2008, at 41, 43 (''While the participation of traditional speculators offers clear benefits, position limits must be carefully administered to ensure that their activities do not ''demoralize'' markets. . . . The CFTC must re-establish and enforce position limits.'').

[147] CME Group, Inc., ''Excessive Speculation and Position Limits in Energy Derivatives Markets,'' CME Group White Paper, at 6 (''Indeed, as the Commission has previously noted, the exchanges have the expertise and are in the best position to fix position limits for their contracts. In fact, this determination led the Commission to delegate to the exchanges authority to set position limits in non-enumerated commodities, in the first instances, almost 30 years ago.'') (available at *http://www.cmegroup.com/company/files/PositionLimitsWhitePaper.pdf*).

[148] Pirrong, Craig, ''Squeezes, Corpses, and the Anti-Manipulation Provisions of the Commodity Exchange Act,'' October 1, 1994, at 2 (''The efficiency of futures markets would be improved, and perhaps substantially so, by eliminating position limits . . . and relying upon revitalized, harm-based sanctions to deter market manipulation.'').

[149] European Commission, ''Review of the Markets in Financial Instruments Directive,'' December 1, 2010, at 82 note 282 (''European Parliament . . . calls on the Commission to develop measures to ensure that regulators are able to set position limits to counter disproportionate price movements and speculative bubbles, as well as to investigate the use of position limits as a dynamic tool to combat market manipulation, most particularly at the point when a contract is approaching expiry. It also requests the Commission to consider rules relating to the banning of purely speculative trading in commodities and agricultural products, and the imposition of strict position limits especially with regard to their possible impact on the price of essential food commodities in developing countries and greenhouse gas emission allowances.'').

[150] 7 U.S.C. 6a(a)(1)–(2).

[151] Another study of actual market events analyzed position limits in the context of the ''Flash Crash'' of May 6, 2010. While this study concluded that position limits would not have prevented the crash, and that price limits were more effective, it measured the impacts of potential limits on certain financial contracts not implicated in the instant rulemaking. Lee, Bernard; Cheng, Shih-Fen; and Koh, Annie, ''Would Position Limits Have Made any Difference to the 'Flash Crash' on May 6, 2010,'' November 1, 2010, at 37.

[152] U.S Commodity Futures Trading Commission, ''Part Two, A Study of the Silver Market,'' May 29, 1981, Report to The Congress in Response to Section 21 of The Commodity Exchange Act.

conduct that those massive positions enabled, the resulting extreme price volatility, and consequent harms to the economy. The second is the PSI Report on Excessive Speculation in the Natural Gas market.[153] As a Congressional report issued following hearings, it is more helpful and persuasive than academic and other studies in indicating how Congress views limits as necessary to prevent the adverse effects of excessively large speculative positions. The PSI Report is also more helpful because it thoroughly studied actual market events involving a vital energy commodity, natural gas, examined how Amaranth's buildup of massive speculative positions by itself created a risk of market harms, documented how Amaranth sought to avoid existing limits, and analyzed how its ability to do so was a cause of the attendant extreme price volatility documented in the report.

The Commission requests comment on its discussion of studies and reports. It also invites commenters to advise the Commission of any additional studies that the Commission should consider, and why.

B. Proposed Rules

1. Section 150.1—Definitions

i. Various Definitions Found in § 150.1

The Commission proposes to amend the definitions of ''futures-equivalent,'' ''independent account controller,'' ''long position,'' ''short position,'' and ''spot month'' found in § 150.1 of its regulations to conform them to the concepts and terminology of the CEA, as amended by the Dodd-Frank Act.[154] The Commission also is proposing to add to § 150.1, definitions for ''basis contract,'' ''calendar spread contract,'' ''commodity derivative contract,'' ''commodity index contract,'' ''core referenced futures contract,'' ''eligible affiliate,'' ''entity,'' ''excluded commodity,'' ''intercommodity spread contract,'' ''intermarket spread positions,'' ''intramarket spread positions,'' ''physical commodity,'' ''pre-enactment swap,'' ''pre-existing position,'' ''referenced contract,'' ''spread contract,'' ''speculative position limit,'' ''swap,'' ''swap dealer'' and ''transition period swap.'' In addition, the Commission is proposing to move the definition of bona fide hedging from § 1.3(z) into part 150, and to amend and update it. Moreover, the Commission proposes to delete the definition for ''the first delivery month of the 'crop year.' '' The Commission notes that several terms that are not currently in part 150 are not included in the current rulemaking proposal even though definitions for those terms were adopted in vacated part 151. The Commission does not view definition of these terms as necessary for clarity in light of other revisions proposed herein. The terms not currently proposed include ''swaption'' and ''trader.'' [155] Separately, the Commission is making a non-substantive change to list the definitions in alphabetical order rather than by use of assigned letters. This last change will be helpful when looking for a particular definition, both in the near future, in light of the additional definitions proposed to be adopted, and in the expectation that future rulemakings may adopt additional definitions.

a. Basis Contract

While the term ''basis contract'' is not defined in current § 150.1, a definition was adopted in vacated § 151.1. The definition adopted in § 151.1 defined basis contract as ''an agreement, contract or transaction that is cash-settled based on the difference in price of the same commodity (or substantially the same commodity) at different delivery locations.'' When it adopted part 151, the Commission noted that a swap based on the difference in price of a commodity (or substantially the same commodity) at different delivery locations was a ''basis contract and therefore not subject to the limits adopted therein.[156]

Under the proposal, the definition for ''basis contract'' adopted in § 150.1 would expand upon the definition of basis contract adopted in vacated part 151, by defining basis contract to mean ''a commodity derivative contract that is cash-settled based on the difference in: (1) The price, directly or indirectly, of: (a) A particular core referenced futures contract; or (b) a commodity deliverable on a particular core referenced futures contract, whether at par, a fixed discount to par, or a premium to par; and (2) the price, at a different delivery location or pricing point than that of the same particular core referenced futures contract, directly or indirectly, of: (a) A commodity deliverable on the same particular core referenced futures contract, whether at par, a fixed discount to par, or a premium to par; or (b) a commodity that is listed in appendix B to this part as substantially the same as a commodity underlying the same core referenced futures contract.''

The Commission notes that the proposal excludes intercommodity spread contracts, calendar spread contracts, and basis contracts from the definition of ''commodity index contract.''

The Commission is proposing appendix B to this part, Commodities Listed as Substantially the Same for Purposes of the Definition of Basis Contract. The Commission proposes to expand the definition of basis contract to include contracts cash-settled on the difference in prices of two different, but economically closely related commodities. The basis contract definition in vacated part 151 targeted the location differential. Now the Commission is proposing a basis contract definition that would expand to include certain quality differentials (e.g., RBOB vs. 87 unleaded).[157] The intent of the expanded definition is to reduce the potential for excessive speculation in referenced contracts where, for example, a speculator establishes a large outright directional position in referenced contracts and nets down that directional position with a contract based on the difference in price of the commodity underlying the referenced contracts and a close economic substitute that was not deliverable on the core referenced futures contract. In the absence of this expanded definition, the speculator could then increase further the large position in the referenced contracts. By way of comparison, the Commission preliminarily believes there is greater concern that (i) someone may manipulate the markets by disguise of a directional exposure through netting down the directional exposure using one of the legs of a quality differential (if that quality differential contract were not exempted) than (ii) that someone may use certain quality differential contracts that were exempted from position limits to manipulate the

[153] U.S. Senate Permanent Subcommittee on Investigations, ''Excessive Speculation in the Natural Gas Market,'' June 25, 2007.

[154] In a separate proposal approved on the same date as this proposal, the Commission is proposing amendments to § 150.4—aggregation of positions (''Aggregation NPRM'') (Nov. 5, 2013), including amendments to the definitions of ''eligible entity'' and ''independent account controller.''

[155] ''Swaption'' was defined in vacated part 151 to mean ''an option to enter into a swap or a physical commodity option.'' ''Trader'' was defined in vacated part 151 to mean ''a person that, for its own account or for an account that it controls, makes transactions in Referenced Contracts or has such transactions made.'' The Commission notes that while vacated part 151 and several places in current part 150 use the term ''trader,'' the term ''person'' is currently used in both § 1.3(z) and in other places in part 150. The amendments in both the Aggregation NPRM and this NPRM use the term ''person'' in a manner consistent with its current use in part 150.

[156] 76 FR 71626, 71631 (n. 49), Nov. 18, 2011.

[157] The expanded basis contract definition is not intended to include significant time differentials in prices of the two commodities (e.g., the expanded basis contract definition would not include calendar spreads for nearby vs. deferred contracts).

outright price of a referenced contract. Historically, manipulation has occurred though use of outright positions (as in the case of the Hunt brothers) or time spreads (Amaranth, for example, used calendar month spreads), rather than quality or locational differentials.

The Commission seeks comment on alternatives to the specification of quality standards for substantially the same commodity, such as a methodology to identify and define which differential contracts should be excluded from position limits. (i) Should the Commission expand the definition of basis contract to include any commodity priced at a differential to any of its products and by-products? For example, should a basis contract include a soybean crush spread contract or a crude oil crack spread contract, regardless of the number of components? (ii) Should the Commission expand the definition of basis contract to include a product or by-product of a particular commodity, priced at a differential to another product or by-product of that same commodity? For example, should the basis contract definition include a contract based on jet fuel priced at a differential to heating oil? Jet fuel and heating oil are both products of the same commodity, namely crude oil. (iii) Should the Commission expand the definition of basis contract for a particular commodity to include other similar commodities? For example, should the basis contract definition include a contract based on the difference in prices of light sweet crude oil and a sour crude oil that is not deliverable on the WTI contract?

b. Commodity Derivative Contract

The Commission proposes in § 150.1(l) to define the term ''commodity derivative contract'' for position limits purposes as shorthand for any futures, option, or swap contract in a commodity (other than a security futures product as defined in CEA section 1a(45)). Part 150 refers only to futures and options, while vacated part 151 was drafted without the use of any similar concise phrase. It was determined during the process of updating part 150 that the use of such a generic term would be a useful way to streamline and simplify references in part 150 to the various kinds of contracts to which the position limits regime applies. As such, this new definition can be found frequently throughout the Commission's proposed amendments to part 150.[158]

c. Commodity Index Contract

The term ''commodity index contract'' is not currently defined in § 150.1; a definition for the term was adopted in vacated part 151.[159] Under the definition adopted in § 151.1, commodity index contract means ''an agreement, contract, or transaction that is not a basis or any type of spread contract, based on an index comprised of prices of commodities that are not the same or substantially the same; provided that, a commodity index contract used to circumvent speculative position limits shall be considered to be a Referenced Contract for the purpose of applying the position limits of § 151.4.''[160]

The Commission noted in the vacated part 151 final rulemaking that the definition of ''Referenced Contract'' in § 151.1 expressly excluded commodity index contracts.[161] The Commission also noted that ''if a swap is based on prices of multiple different commodities comprising an index, it is a 'commodity index contract.' ''[162] As the preamble pointed out, it would not, therefore, be subject to position limits.[163]

The Commission proposes in the current rulemaking to add into § 150.1 substantially the same definition for ''commodity index contract'' as was adopted in vacated § 151.1, with one change. The proviso included in § 151.1, which required treatment of a position in a commodity index contract as a Referenced Contract if the contract was used to circumvent speculative position limits, acted in the § 151.1 definition as an anti-evasion provision, a substantive regulatory requirement. Consequently, to provide greater clarity as to the effect of the provision, the definition of ''commodity index contract'' proposed in 150.1 mirrors that of the definition in 151.1, but with no anti-evasion proviso. Instead, an anti-evasion provision, while similar to that contained in § 151.1, is included in proposed § 150.2(h).[164]

As in vacated part 151, and as noted above, the definition of ''referenced contract'' proposed in the current rulemaking also expressly excludes commodity index contracts. However, as the Commission noted in the final part 151 Rulemaking, part 20 of the Commission's regulations requires reporting entities to report commodity reference price data sufficient to distinguish between commodity index contract and non-commodity index contract positions in covered contracts.[165] Therefore, for commodity index contracts, the Commission intends to rely on the data elements in § 20.4(b) to distinguish data records subject to § 150.2 position limits from those contracts that are excluded from § 150.2. This will enable the Commission to set position limits using the narrower data set (*i.e.,* referenced contracts subject to § 150.2 position limits) as well as conduct surveillance using the broader data set.

d. Core Referenced Futures Contract

While current part 150 does not contain a definition of the term ''core referenced futures contracts,'' a definition for the term was adopted in vacated § 151.1 as a simple short-hand phrase to denote certain futures contracts, regarding which several position limit rules were then applied. The definition adopted in § 151.1 provided that a core referenced futures contract was ''a futures contract defined in § 151.2''; section 151.2 provided a list of 28 physical commodity futures and option contracts.[166]

The Commission proposes to include in § 150.1 the same definition as was adopted in vacated § 151.1—such that the definition would cite to futures contracts listed in § 151.2.[167]

e. Eligible Affiliate

The term ''eligible affiliate,'' used in proposed § 150.2(c)(2), is not defined in current § 150.1. The Commission proposes to amend § 150.1 to define an

[158] *See, e.g.,* proposed amendments to § 150.1 (the definitions of: ''basis contract,'' the definition of ''bona fide hedging position,'' ''inter-market spread position,'' ''intra-market spread position,'' ''pre-existing position,'' ''speculative position limits,'' and ''spot month''), §§ 150.2(f)(2), 150.3(d), 150.3(h), 150.5(a), 150.5(b), 150.5(e), 150.7(d), 150.7(f), appendix A to part 150, and appendix C to part 150.

[159] 76 FR at 71685.

[160] *See id.*

[161] *Id.* at 71656.

[162] *Id.* at 71631 n.49.

[163] *Id.* The Commission clarifies here, that, as was noted in the vacated part 151 Rulemaking, if a swap is based on the difference between two prices of two different commodities, with one linked to a core referenced futures contract price (and the other either not linked to the price of a core referenced futures contract or linked to the price of a different core referenced futures contract), then the swap is an ''intercommodity spread contract,'' is not a commodity index contract, and is a Referenced Contract subject to the position limits specified in § 150.2. The Commission further clarifies that, again as was noted in the vacated part 151 Rulemaking, a contract based on the prices of a referenced contract and the same or substantially the same commodity (and not based on the difference between such prices) is not a commodity index contract and is a referenced contract subject to position limits specified in § 150.2. *See id.*

[164] *See* discussion below.

[165] 76 FR at 71632.

[166] The Commission clarified in adopting § 151.2, that core referenced futures contracts included options that expire into outright positions in such contracts. *See* 76 FR at 71631.

[167] The selection of the core referenced futures contracts is explained in the discussion of proposed § 150.2. *See* discussion below.

''eligible affiliate'' as ''an entity with respect to which another person: (1) Directly or indirectly holds either: (i) A majority of the equity securities of such entity, or (ii) the right to receive upon dissolution of, or the contribution of, a majority of the capital of such entity; (2) reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of such entity; and (3) is required to aggregate the positions of such entity under § 150.4 and does not claim an exemption from aggregation for such entity.'' [168]

The definition of ''eligible affiliate'' proposed in the current NPRM qualifies persons as eligible affiliates based on requirements similar to those recently adopted by the Commission in a separate rulemaking. On April 1, 2013, the Commission provided relief from the mandatory clearing requirement of section 2(h)(1)(A) of the Act for certain affiliated persons if the affiliated persons (''eligible affiliate counterparties'') meet requirements contained in § 50.52.[169] Under both § 50.52 and the current proposed definition, a person is an eligible affiliate if the person, directly or indirectly, holds a majority ownership interest in the other counterparty (a majority of the equity securities of such entity, or the right to receive upon dissolution of, or the contribution of, a majority of the capital of such entity), reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of such entity. In addition, for purposes of the position limits regime, an eligible affiliate, as proposed in § 150.1, must be required to aggregate the positions of such entity under § 150.4 and does not claim an exemption from aggregation for such entity.[170]

The Commission requests comment on the proposed definition. Is the definition an appropriate one for purposes of the position limits regime? Should the Commission consider adopting a definition that more closely tracks the ''eligible affiliate counterparties'' definition adopted in § 50.52 or is the difference appropriate in light of the differing regulatory purposes of the two regulations?

f. Entity

The current proposal defines ''entity'' to mean ''a 'person' as defined in section 1a of the Act.'' [171] The term is not defined in either current § 150.1, but was defined in vacated § 151.1; the language proposed here tracks that adopted in § 151.1. The term ''entity,'' like that of ''person,'' is used in a number of contexts, and in various definitions. Defining the term, therefore, provides a clear and unambiguous meaning, and prevents confusion.

g. Excluded Commodity

The phrase ''excluded commodity'' was added into the CEA in the CFMA, but was not defined or used in part 150. CEA section 4a(a)(2)(A), as amended by the Dodd-Frank Act, utilizes the phrase ''excluded commodity'' when it provides a timeline under which the Commission is charged with setting limits for futures and option contracts other than on excluded commodities.[172]

Part 151 included in the definition section of vacated § 151.1, a definition which simply incorporated into part 151 the statutory meaning, as a useful term for purposes of a number of the changes made by part 151 to the position limits regime. For example, the phrase was used in vacated § 151.11, in the provision of acceptable practices for DCMs and SEFs in their adoption of rules and procedures for monitoring and enforcing position accountability provisions; it was also used in the amendments to the definition of bona fide hedging.[173] Similarly, the Commission believes that the adoption into part 150 of the excluded commodity definition will be a useful tool in addressing the same provisions, and so proposes to adopt into § 150.1 the definition used in § 151.1.[174]

h. First Delivery Month of the Crop Year

The term ''first delivery month of the crop year'' is currently defined in § 150.1(c), with a table of the first delivery month of the crop year for the commodities for which position limits are currently provided in § 150.2. The crop year definition has been pertinent for purposes of the spread exemption to the single month limit in current § 150.3(a)(3), which limits spread positions in a single month to a level no more than that of the all-months limit. The Commission did not adopt this definition in vacated part 151.[175] In the current proposal, the Commission proposes to amend § 150.1 to delete the definition of ''crop year.'' The elimination of the definition reflects the fact that the definition is no longer needed, since the current proposal, like the approach adopted in part 151, would raise the level of individual month limits to the level of the all-month limits.

i. Futures Equivalent

The term ''futures-equivalent'' is currently defined in § 150.1(f) to mean ''an option contract which has been adjusted by the previous day's risk factor, or delta coefficient, for that option which has been calculated at the close of trading and published by the applicable exchange under § 16.01 of this chapter.'' [176] The Commission proposes to retain the definition currently found in § 150.1(f), while broadening it in light of the Dodd-Frank Act amendments to CEA section 4a.[177] The proposed amendments would also delete, as unnecessary, the reference to § 16.01 found in the current definition.

As proposed, ''futures equivalent'' would be defined in § 150.1 as ''(1) An option contract, whether an option on a future or an option that is a swap, which has been adjusted by an economically reasonable and analytically supported risk factor, or delta coefficient, for that

[168] *See* proposed § 150.1.

[169] *See* Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21749, 21783, Apr. 11, 2013. Section 50.52(a) addresses eligible affiliate counterparty status, allowing a person not to clear a swap subject to the clearing requirement of section 2(h)(1)(A) of the Act and part 50 if the person meets the requirements of the conditions contained in paragraphs (a) and (b) of § 50.52. The conditions in paragraph (a) of § 50.52 specify either one counterparty holds a majority ownership interest in, and reports its financial statements on a consolidated basis with, the other counterparty, or both counterparties are majority owned by a third party who reports its financial statements on a consolidated basis with the counterparties.

The conditions in paragraph (b) of § 50.52 address factors such as the decision of the parties not to clear, the associated documentation, audit, and recordkeeping requirements, the policies and procedures that must be established, maintained, and followed by a dealer and major swap participant, and the requirement to have an appropriate centralized risk management program, rather than the nature of the affiliation. As such, those conditions are less pertinent to the definition of eligible affiliate.

[170] *See* proposed amendments to the definition of ''eligible affiliate'' in proposed § 150.1.

[171] CEA section 1a(38); 7 U.S.C. 1a(38).

[172] CEA section 4a(2)(A); 7 U.S.C. 6a(2)(A).

[173] *See* 17 CFR 1.3(z) as amended by the vacated part 151 Rulemaking.

[174] *See e.g.,* proposed § 150.1 definitions for bona fide hedging and proposed amendments to § 150.5(b).

[175] *See* 76 FR at 71685.

[176] 17 CFR 150.1(f).

[177] Amendments to CEA section 4a(1) authorize the Commission to extend position limits beyond futures and option contracts to swaps traded on a DCM or SEF and swaps not traded on a DCM or SEF that perform or affect a significant price discovery function with respect to regulated entities (''SPDF swaps''). 7 U.S.C. 6a(a)(1). In addition, under new CEA sections 4a(a)(2) and 4a(a)(5), speculative position limits apply to agricultural and exempt commodity swaps that are ''economically equivalent'' to DCM futures and option contracts. 7 U.S.C. 6a(a)(2) and (5).

option computed as of the previous day's close or the current day's close or contemporaneously during the trading day, and; (2) A swap which has been converted to an economically equivalent amount of an open position in a core referenced futures contract.''

Vacated § 151.1 did not retain a definition for ''futures-equivalent;'' instead final part 151 referred to guidance on futures equivalency provided in appendix A to part 20.[178] The Commission notes that while the part 20 ''futures equivalent'' definition is consistent with the ''futures-equivalent'' definition proposed herein, it addresses only swaps, and cites to, and relies on, the guidance provided in appendix A to part 20.[179] The definition proposed herein addresses both options on futures and options that are swaps; it also includes and expands upon clarifications that are incorporated into the current definition regarding the computation time and the adjustment by an economically reasonable and analytically supported risk factor, or delta coefficient.

As noted above, the current § 150.1(f) definition of ''futures-equivalent'' is narrowly defined to mean ''an option contract,'' and nothing else. Although certain contracts, from a practical standpoint, may be economically equivalent to futures contracts, as that terms is defined in § 150.1, such products are not ''futures-equivalent'' under the narrow definition of current § 150.1(f) unless they are options on those actual futures. Therefore, current § 150.1(f) is narrowly tailored to target only specifically enumerated futures contracts on ''legacy'' agricultural commodities and their equivalent options.

The current rulemaking, like vacated part 151, establishes federal position limits and limit formulas for 28 physical commodity futures and option contracts, or ''core referenced futures contracts,'' and applies these limits to all derivatives that are directly or indirectly linked to the price of a core referenced futures contracts, or based on the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location or locations as specified in that particular core referenced futures contract, and defines such derivative products, collectively, as ''referenced contracts.'' Therefore, the position limits amendments proposed in this current rulemaking, similar to the position limits regime established in vacated part 151, apply across different trading venues to economically equivalent contracts, as that term is defined in § 150.1, that are based on the same underlying commodity. As discussed supra, however, current part 150 defines ''futures-equivalent'' narrowly to mean ''an option contract,'' and makes no mention of broadly defined ''referenced contracts.'' Consequently, as noted above, and consistent with these changes to the position limits regime, including the applicability of aggregate position limits to economically equivalent ''referenced contracts'' across different trading venues, the Commission proposes to expand the strict ''futures-equivalent'' standard set forth in current part 150.

j. Intercommodity Spread Contract

Current part 150 does not include a definition of the term ''intercommodity spread contract,'' which was introduced and adopted in vacated part 151. The Commission proposes to add into § 150.1 the definition adopted in § 151.1,[180] such that an ''intercommodity spread contract'' means ''a cash-settled agreement, contract or transaction that represents the difference between the settlement price of a referenced contract and the settlement price of another contract, agreement, or transaction that is based on a different commodity.'' The Commission determined, however, to adopt the term ''intercommodity spread contract'' as part of the definition of reference contract rather than as a separate term, since the phrase ''intercommodity spread contract'' is used solely for purposes of defining the term ''referenced contract.'' The inclusion of the term as part of the definition of referenced contract is intended to simplify the definition section and make it easier to understand.

k. Intermarket Spread Position

The term ''intermarket spread position'' is not defined in current part 150, and was not adopted in part 151. But in conjunction with the amendments to part 150 to address the changes to CEA section 4a made by the Dodd-Frank Act,[181] the Commission proposes to add into § 150.1 a definition for ''intermarket spread position'' to mean ''a long position in a commodity derivative contract in a particular commodity at a particular designated contract market or swap execution facility and a short position in another commodity derivative contract in that same commodity away from that particular designated contract market or swap execution facility.'' Among the changes to CEA section 4a, new section 4a(a)(6) of the Act requires the Commission to apply position limits on an aggregate basis to contracts based on the same underlying commodity across certain markets.[182] The Commission believes that the term ''intermarket spread position'' simplifies the proposed changes to § 150.5, which provide acceptable exemptions DCMs and SEFs may choose to grant from speculative position limits.[183]

l. Intramarket Spread Position

Neither current part 150, nor vacated part 151, includes a definition of the term ''intramarket spread contract.'' The Commission now proposes to add into § 150.1 the definition, such that ''intramarket spread position'' means ''a long position in a commodity derivative contract in a particular commodity and a short position in another commodity derivative contract in the same commodity on the same designated contract market or swap execution facility.''

Current part 150 includes exemptions for certain spread positions. For example, current § 150.3(a)(3) provides an exemption for spread (or arbitrage) positions, but this exemption is limited to those between single months for futures contracts and/or, options thereon, if outside of the spot month, and only if in the same crop year. While current § 150.3(a)(3) limits the spread

[178] 76 FR at 71633 (n. 67) (stating that ''For purposes of applying the limits, a trader shall convert and aggregate positions in swaps on a futures equivalent basis consistent with the guidance in the Commission's appendix A to Part 20, Large Trader Reporting for Physical Commodity Swaps.''). *See also* 76 FR 43851, 43865, Jul. 22, 2011.

[179] *See* 17 CFR 20.1 (''Futures equivalent means an economically equivalent amount of one or more futures contracts that represents a position or transaction in one or more paired swaps or swaptions consistent with the conversion guidelines in appendix A of this part.'').

[180] In vacated part 151, ''intercommodity spread contract'' was defined to mean ''a cash-settled agreement, contract or transaction that represents the difference between the settlement price of a Referenced Contract and the settlement price of another contract, agreement, or transaction that is based on a different commodity.'' *See* vacated § 151.1.

[181] *See e.g.,* discussions of Dodd-Frank changes to CEA section 4a above and below.

[182] CEA section 4a(a)(6) requires the Commission to apply position limits on an aggregate basis to (1) contracts based on the same underlying commodity across DCMs; (2) with respect to foreign boards of trade (''FBOTs''), contracts that are price-linked to a DCM or SEF contract and made available from within the United States via direct access; and (3) SPDF swaps. 7 U.S.C. 6a(a)(6). *See also,* consideration of proposed changes to § 150.2 for further discussion.

[183] *See e.g.,* § 150.5(a)(2)(B)(ii); *see also* 150.5(b)(5)(b)(iv).

exemption provided thereunder, the exemption under current § 150.5(a) is not so limited. Instead, under current § 150.5(a), exchanges may exempt from position limits ''positions which are normally known in the trade as ''spreads, straddles, or arbitrage. . . .'' [184] The Commission notes that the definition it now proposes for ''intramarket spread position'' is a generic term, and not limited only to futures and/or options thereon.[185] In a similar manner to adoption of the term ''intermarket spread position,'' the term ''intramarket spread position,'' therefore, simplifies the Commissions amendments to exemptions for spread positions, including proposed changes to § 150.5, which, as noted above, provide acceptable exemptions DCMs and SEFs may choose to grant from speculative position limits.

m. Long Position

The term ''long position'' is currently defined in § 150.1(g) to mean ''a long call option, a short put option or a long underlying futures contract,'' but the phrase was not retained in vacated § 151.1. The Commission proposes to retain the definition, but to update it to make it also applicable to swaps such that a long position would include a long futures-equivalent swap.

n. Physical Commodity

The Commission proposes to amend § 150.1 by adding in a definition of the term ''physical commodity'' for position limits purposes. Congress used the term ''physical commodity'' in CEA sections 4a(a)(2)(A) and 4a(a)(2)(B) to mean commodities ''other than excluded commodities as defined by the Commission.'' Therefore, the Commission interprets ''physical commodities'' to include both exempt and agricultural commodities, but not excluded commodities, and proposes to define the term as such.[186]

o. Referenced Contracts

Part 150 currently does not include a definition of the phrase ''Referenced Contract,'' which was introduced and adopted in vacated part 151.[187] As was noted when part 151 was adopted, the Commission identified 28 core referenced futures contracts and proposed to apply aggregate limits on a futures equivalent basis across all derivatives that [met the definition of Referenced Contracts'].'' [188]

The vacated § 151.1 definition of Referenced Contracts included: (1) The Core Referenced Futures Contract; (2) ''look-alike'' contracts (i.e., those that settle off of the Core Referenced Futures Contract and contracts that are based on the same commodity for the same delivery location as the Core Referenced Futures Contract); (3) contracts with a reference price based only on the combination of at least one Referenced Contract price and one or more prices in the same or substantially the same commodity as that underlying the relevant Core Referenced Futures Contract; and (4) intercommodity spreads with two components, one or both of which are Referenced Contracts. According to the Commission, these criteria captured contracts with prices that are or should be closely correlated to the prices of the Core Referenced Futures Contract, as defined in vacated § 151.1.[189] In addition, the definition included categories of Referenced Contract based on objective criteria and readily available data (i.e., derivatives that are directly or indirectly linked to or based on the same commodity for delivery at the same delivery location as a Core Referenced Futures Contract).[190] At that time, the Commission clarified that a swap contract using as its sole floating reference price the prices generated directly or indirectly from the price of a single Core Referenced Futures Contract or a swap priced based on a fixed differential to a Core Referenced Futures Contract, were look-alike Referenced Contracts, and subject to the limits adopted in vacated part 151.[191] In addition, the definition included options that expire into outright positions in such contracts.[192]

In response to comments that the Commission should broaden the scope of Referenced Contracts, the Commission noted that expanding the scope of position limits based, for example, on cross-hedging relationships or other historical price analysis would be problematic as historical relationships may change over time and, additionally, would require individualized determinations. In light of these circumstances, the Commission determined that it was not necessary to expand the scope of position limits beyond what was adopted. The Commission also noted that the commenters did not provide specific criteria or thresholds for making determinations as to which price-correlated commodity contracts should be subject to limits, further noting that it would consider amending the scope of economically equivalent contracts (and the relevant identifying criteria) as it gained experience in this area.[193]

The definition for ''referenced contract'' proposed in § 150.1 mirrors the definition proposed in § 151.1, with the delineation of several related terms incorporated into the definition.[194] The

[184] The Commission notes that the exemption provided in § 150.5(a) for ''positions which are normally known in the trade as 'spreads, straddles, or arbitrage,' '' tracks CEA section 4a(a)(1). 7 U.S.C. 6a(a)(1). Also, various DCMs currently have rules in place that provide exemptions for such as ''spreads, straddles, or arbitrage'' positions. *See, e.g.,* ICE Futures U.S. rule 6.27 and CME rule 559.C.

[185] For further discussion regarding the exemptions for intramarket spread positions, *see infra,* discussion regarding § 150.5(a)(2) and (b)(5).

[186] For position limits purposes, proposed § 150.1 would define ''physical commodity'' to mean ''any agricultural commodity as that term is defined in § 1.3 of this chapter or any exempt commodity as that term is defined in section 1a(20) of the Act.''

[187] Vacated § 151.1 defined ''Referenced Contract'' to mean ''on a futures-equivalent basis with respect to a particular Core Referenced Futures Contract, a Core Referenced Futures Contract listed in § 151.2, or a futures contract, options contract, swap or swaption, other than a basis contract or contract on a commodity index that is: (1) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular Core Referenced Futures Contract; or (2) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular Core Referenced Futures Contract for delivery at the same location or locations as specified in that particular Core Referenced Futures Contract.''

[188] 76 FR at 71629.

[189] *Id.* at 71630.

[190] *Id.* at 71630–31.

[191] *Id.* at 71631 n.50 (''The Commission has clarified in its definition of 'Referenced Contract' that position limits extend to contracts traded at a fixed differential to a Core Referenced Futures Contract (*e.g.,* a swap with the commodity reference price NYMEX Light, Sweet Crude Oil + $3 per barrel is a Referenced Contract) or based on the same commodity at the same delivery location as that covered by the Core Referenced Futures Contract, and not to unfixed differential contracts (*e.g.,* a swap with the commodity reference price Argus Sour Crude Index is not a Referenced Contract because that index is computed using a variable differential to a Referenced Contract).'').

[192] *Id.* at 71631.

[193] *Id.*

[194] In the current rulemaking, the term ''referenced contract'' is defined in § 150.1 to mean, on a futures-equivalent basis with respect to a particular core referenced futures contract, ''a core referenced futures contract listed in § 151.2(d) of this part, or a futures contract, options contract, or swap, other than a guarantee of a swap, a basis contract, or a commodity index contract: (1) That is: (a) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular core referenced futures contract; or (b) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location or locations as specified in that particular core referenced futures contract; and (2) Where: (a) Calendar spread contract means a cash-settled agreement, contract, or transaction that represents the difference between the settlement price in one or a series of contract months of an agreement, contract or transaction and the settlement price of another contract month or another series of contract months' settlement prices for the same agreement, contract or transaction; (b) Commodity index contract means an agreement, contract, or transaction that is not a basis or any type of spread contract, based on an index comprised of prices of

beginning of the current definition parallels the definition in vacated § 151.1, differing only with the addition of a clarification that the definition of ''referenced contract'' does not include guarantees of a swap. This clarification is added into the list of products that are not included in the definition.[195] In the proposed definition, ''referenced contract'' would not include ''a guarantee of a swap, a basis contract, or a commodity index contract.'' [196] In addition, for the sake of clarify, the proposal incorporates into the definition of ''referenced contract'' several related terms. Consequently, the definition for ''referenced contract'' delineates the meaning of ''calendar spread contract,'' ''commodity index contract,'' ''spread contract,'' and ''intercommodity spread contract.'' [197] The incorporation of these terms into the definition of ''referenced contract'' is intended to retain in one place the various parts and meanings of the definition, thereby facilitating comprehension of the definition.

p. Short Position

The term ''short position'' is currently defined in § 150.1(c) to mean ''a short call option, a long put option, or a short underlying futures contract.'' Vacated part 151 did not retain this definition. The current proposal would amend the definition to state that a short position means ''a short call option, a long put option or a short underlying futures contract, or a short futures-equivalent swap.'' This revised definition reflects the fact that under the Dodd-Frank Act, the Commission is charged with applying the position limits regime to swaps.

q. Speculative Position Limit

The term ''speculative position limit'' is currently not defined in § 150.1 and was not defined in vacated part 151. The Commission now proposes to define the term ''speculative position limit'' to mean ''the maximum position, either net long or net short, in a commodity derivatives contract that may be held or controlled by one person, absent an exemption, such as an exemption for a bona fide hedging position. This limit may apply to a person's combined position in all commodity derivative contracts in a particular commodity (all-months-combined), a person's position in a single month of commodity derivative contracts in a particular commodity, or a person's position in the spot month of commodity derivative contacts in a particular commodity. Such a limit may be established under federal regulations or rules of a designated contract market or swap execution facility. An exchange may also apply other limits, such as a limit on gross long or gross short positions, or a limit on holding or controlling delivery instruments.''

This proposed definition is similar to definitions for position limits used by the Commission for many years; the various regulations and defined terms included use of maximum amounts ''net long or net short,'' which limited what any one person could ''hold or control,'' ''one grain on any one contract market'' (or in ''in one commodity'' or ''a particular commodity''), and ''in any one future or in all futures combined.'' For example, in 1936, Congress enacted the CEA, which authorized the CFTC's predecessor, the CEC, to establish limits on speculative trading. Congress empowered the CEC to ''fix such limits on the amount of trading . . . as the [CEC] finds is necessary to diminish, eliminate, or prevent such burden.'' [198] The first speculative position limits were issued by the CEC in December 1938.[199] Those first speculative position limits rules provided in § 150.1 for limits on position and daily trading in grain for future delivery, adopting a maximum amount ''net long or net short position which any one person may hold or control in any one grain on any one contract market'' as 2,000,000 bushels ''in any one future or in all futures combined.'' [200]

Another example is found in the glossaries published by the Commission for many years. Various Commission documents over the years have included a glossary. For example, the Commission's annual report for 1983 includes in its glossary ''Position Limit The maximum position, either net long or net short, in one commodity future combined which may be held or controlled by one person as prescribed by any exchange or by the CFTC.'' The version of the staff glossary currently posted on the CFTC Web site defines speculative position limit as ''[t]he maximum position, either net long or net short, in one commodity future (or option) or in all futures (or options) of one commodity combined that may be held or controlled by one person (other than a person eligible for a hedge exemption) as prescribed by an exchange and/or by the CFTC.''

r. Spot Month

Vacated part 151 adopted an amended definition for ''spot month'' that replaced the definition for spot month currently found in § 150.1 by citing to the definition provided in § 151.3. Vacated § 151.3 provided detailed lists of spot months separately for agricultural, metals and energy commodities.

The Commission proposes to adopt a simplified update to the definition of ''spot month'' by expanding upon the current § 150.1 definition. The definition, as expanded, would specifically address both physical-delivery contracts and cash-settled contracts, and clarify the duration of ''spot month.'' Under the proposed changes, the term ''spot month'' does not refer to a month of time. Rather, the definition clarifies that the ''spot

commodities that are not the same or substantially the same; (c) Spread contract means either a calendar spread contract or an intercommodity spread contract; and (d) Intercommodity spread contract means a cash-settled agreement, contract or transaction that represents the difference between the settlement price of a referenced contract and the settlement price of another contract, agreement, or transaction that is based on a different commodity.''

[195] As defined in vacated § 151.1, ''Referenced Contract'' excludes ''a basis contract or contract on a commodity index.'' *See* vacated § 151.1.

[196] The Commission proposes to exclude a guarantee of a swap from the definition of a referenced contract due to regulatory developments that occurred after the vacated part 151 Rulemaking. In connection with further defining the term ''swap'' jointly with the Securities and Exchange Commission, (*see generally* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48208, Aug. 13, 2012 (''Product Definitions Adopting Release'')), the Commission interpreted the term ''swap'' (that is not a ''security-based swap'' or ''mixed swap'') to include a guarantee of such swap, to the extent that a counterparty to a swap position would have recourse to the guarantor in connection with the position. *See id.* at 48226. Excluding guarantees of swaps from the definition of referenced contract should help avoid any potential confusion regarding the application of position limits to guarantees of swaps, which could impede the Commission's efforts to monitor compliance with the requirements of the CEA. In addition, if the rules proposed in the Aggregation NPRM are adopted, it would obviate the need to include guarantees of swaps in the definition of referenced contracts.

[197] *Compare* vacated § 151.1 *with* proposed § 150.1.

[198] CEA section 6a(1) (Supp. II 1936).

[199] 3 FR 3145, Dec. 24, 1938.

[200] 17 CFR 150.1 (1938) (Part 150—Orders of The Commodity Exchange Commission)(''Limits on position and daily trading in grain for future delivery. The following limits on the amount of trading under contracts of sale of grain for future delivery on or subject to the rules of contract markets which may be done by any person are hereby proclaimed and fixed, to be in full force and effect on and after December 31, 1938: (a) Position limits. (1) The limit on the maximum net long or net short position which any one person may hold or control in any one grain on any one contract market, except as specifically authorized by paragraph (a) (2), is: 2,000,000 bushels in any one future or in all futures combined. (2) To the extent that the net position held or controlled by any one person in all futures combined in any one grain on any one contract market is shown to represent spreading in the same grain between markets, the limit on net position in all futures combined set forth in paragraph (a)(1) may be exceeded on such contract market, but in no case shall the excess result in a net position of more than 3,000,000.'').

month'' is the trading period immediately preceding the delivery period for a physical-delivery futures contract as well as for any cash-settled swaps and futures contracts that are linked to the physical-delivery contract. The definition continues to define the spot month as the period of time beginning at of the close of trading on the trading day preceding the first day on which delivery notices can be issued to the clearing organization of a contract market, while adding in a clarification that this definition applies only to physical-delivery commodity derivatives contracts. For physical-delivery contracts with delivery beginning after the last trading day, the proposal defines the spot month as the close of trading on the trading day preceding the third-to-last trading day, until the contract is no longer listed for trading (or available for transfer, such as through exchange for physical transactions). This definition is consistent with the current spot month for each of the 28 core referenced futures contracts. The definition proposes similar, but slightly different language for cash-settled contracts, providing that the spot month begins at the earlier of the start of the period in which the underlying cash-settlement price is calculated or the close of trading on the trading day preceding the third-to-last trading day and continues until the contract cash-settlement price is determined.[201] In addition, the definition includes a proviso that, if the cash-settlement price is determined based on prices of a core referenced futures contract during the spot month period for that core referenced futures contract, then the spot month for that cash-settled contract is the same as the spot month for that core referenced futures contract.[202]

s. Spot-Month, Single-Month, and All-Months-Combined Position Limits

In addition to a definition for ''spot month,'' current part 150 includes definitions for ''single month,'' and for ''all-months'' where ''single month'' is defined as ''each separate futures trading month, other than the spot month future,'' and ''all-months'' is defined as ''the sum of all futures trading months including the spot month future.''

Vacated part 151 retained only the definition for spot month, and, instead, adopted a definition for ''spot-month, single-month, and all-months-combined position limits.'' The definition provided that, for Referenced Contracts based on a commodity identified in § 151.2, the maximum number of contracts a trader may hold was as provided in § 151.4.

In the current rulemaking proposal, as noted above, the Commission proposes to amend § 150.1 by deleting the definitions for ''single month,'' and for ''all-months.'' Unlike the vacated part 151 Rulemaking, the current proposal does not include a definition for ''spot-month, single-month, and all-months-combined position limits.'' Instead, the current rulemaking proposes to adopt a definition for ''speculative position limits'' that should obviate the need for these definitions.[203]

t. Spread Contract

Spread contract was defined in vacated part 151 as ''either a calendar spread contract or an intercommodity spread contract.'' [204] The Commission proposes to add the same definition into § 150.1 in conjunction with the proposal to define ''referenced contract.'' [205]

The Commission also notes that while the proposed definition of ''referenced contract'' specifically excludes guarantees of a swap, basis contracts and commodity index contracts, spread contracts are not excluded from the proposed definition of ''referenced contract.'' [206]

u. Swap

The definitions of several terms adopted in vacated part 151 relied on the statutory definition in some cases in conjunction with a further definition adopted by the Commission in other rulemakings.[207] Other defined terms that rely on the statutory definition in included: ''entity,'' ''excluded commodity,'' and ''swap dealer.'' Since the adoption of part 151, the Commission, in a joint rulemaking with the Securities and Exchange Commission, adopted a further definition for ''swap'' in § 1.3(xxx).[208] Consequently, the definition of ''swap'' proposed in the current rulemaking, while paralleling that of the definition included in vacated § 151.1, and while substantially the same, additionally cites to the definition of ''swap'' found in § 1.3(xxx).

v. Swap Dealer

The term ''swap dealer'' is not currently defined in § 150.1, but was defined in vacated 151.1 to mean '' 'swap dealer' as that term is defined in section 1a of the Act and as further defined by the Commission.'' [209] Similar to the definition of ''swap,'' the Commission adopted a definition for ''swap dealer'' since part 151 was finalized.[210] Under the current proposal, § 150.1 would be amend to define ''swap dealer'' to mean '' 'swap dealer' as that term is defined in section 1a of the Act and as further defined in section 1.3 of this chapter.'' This revised definition reflects the fact that the definition of ''swap dealer,'' while paralleling that of the definition included in § 151.1, and while substantially the same, additionally cites to the definition of ''swap dealer'' found in § 1.3(ggg).

ii. Bona Fide Hedging Definition

The core of the Commission's approach to defining bona fide hedging over the years has focused on transactions that offset a recognized physical price risk.[211] Once a bona fide

[201] For example, a ''look-alike'' contract that references a calendar-month average of settlement prices would have the same spot-month limit as the core referenced futures contract (CRFC) but the limit would be in effect beginning with the first calendar day of the cash-settlement period; a ''look-alike'' contract that references a single day's settlement price in the spot-month of the CRFC would have a spot-month limit at the same level as the CRFC but the limit would be in effect only during the spot month of the CRFC.

[202] For example, the physical-delivery NYMEX Henry Hub Natural Gas futures contract would have, as is currently the case for the exchange spot month limit, a spot period beginning on close of trading three business days prior to the last trading day of that core referenced futures contract. The NYMEX Henry Hub Natural Gas Penultimate Financial futures contract (which is cash-settled based on the NYMEX Henry Hub Natural Gas Futures contract settlement price on the business day preceding the last trading day for that physical-delivery contract, and is currently subject to position accountability effective on the last three trading days of the futures contract), would have a spot month period that is the same as that of the physical-delivery NYMEX Henry Hub Natural Gas futures contract.

[203] *See supra* discussion of the proposed definition of ''speculative position limit.''

[204] Vacated § 151.1.

[205] *See supra* discussion of proposed § 150.1 ''referenced contract'' definition.

[206] The Commission notes that this is consistent with vacated part 151. *See, e.g.,* the final part 151 Rulemaking, which noted that commodity index contracts, which by the definition in vacated § 151.1 were expressly excluded from the definition of ''Referenced Contract,'' were not spread contracts. 76 FR at 71656. *See also,* the definition of ''commodity index contract,'' which is defined as ''a contract, agreement, or transaction ''that is not a basis or any type of spread contract, [and] based on an index comprised of prices of commodities that are not the same nor substantially the same.'' Vacated § 151.1.

[207] Under vacated § 151.1, the term ''[s]wap means 'swap' as defined in section 1a of the Act and as further defined by the Commission.''

[208] *See* 77 FR 48208, 48349, Aug. 13, 2012.

[209] *See* vacated § 151.1.

[210] 77 FR 30596, May 23, 2012.

[211] For an historical perspective on the bona fide hedging provision prior to the Dodd-Frank amendments, *see* Testimony of General Counsel Dan M. Berkovitz, Commodity Futures Trading Commission, ''Position Limits and the Hedge Exemption, Brief Legislative History,'' July 28, 2009, available at *http://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement072809*.

hedge is implemented, the hedged entity should be price insensitive because any change in the value of the underlying physical commodity is offset by the change in value of the entity's physical commodity derivative position.

Because a firm that has hedged its price exposure is price neutral in its overall physical commodity position, the hedged entity should have little incentive to manipulate or engage in other abusive market practices to affect prices. By contrast, a party that maintains a derivative position that leaves them with exposure to price changes is not neutral as to price and, therefore, may have an incentive to affect prices. Further, the intention of a hedge exemption is to enable a commercial entity to offset its price risk; it was never intended to facilitate taking on additional price risk.

The Commission recognizes there are complexities to analyzing the various commercial price risks applicable to particular commercial circumstances in order to determine whether a hedge exemption is warranted. These complexities have led the Commission, from time to time, to issue rule changes, interpretations, and exemptions. Congress, too, has periodically revised the Federal statutes applicable to bona fide hedging, most recently in the Dodd-Frank Act. These complexities will be further explored below.

a. Bona Fide Hedging History

Prior to 1974, the term bona fide hedging transactions or positions was defined in section 4a(3) of the Act. That definition only applied to agricultural commodities. When the Commission was created in 1974, the Act's definition of commodity was expanded. At that time, Congress was concerned that the limited hedging definition, even if applied to newly regulated commodity futures, would fail to accommodate the commercial risk management needs of market participants that could emerge over time. Accordingly, Congress, in section 404 of the Commodity Futures Trading Commission Act of 1974, repealed the statutory definition and gave the Commission the authority to define bona fide hedging.[212] In response to the 1974 legislation, the Commission's predecessor adopted in 1975 a bona fide hedging definition in § 1.3(z) of its regulations stating, among other requirements, that transactions or positions would not be classified as hedging unless their bona fide purpose was to offset price risks incidental to commercial cash or spot operations, and such positions were established and liquidated in an orderly manner and in accordance with sound commercial practices.[213] Shortly thereafter, the newly formed Commission sought comment on amending that definition.[214] Given the large number of issues raised in comment letters, the Commission adopted the predecessor's definition with minor changes as an interim definition of bona fide hedging transactions or positions, effective October 18, 1975.[215]

In 1977, the Commission proposed a revised definition of bona fide hedging that largely forms the basis of the current definition of bona fide hedging.[216] The 1977 proposed definition set forth: (i) A general definition of bona fide hedging positions under economically appropriate circumstances and subject to other conditions (noted below); (ii) an enumerated list of specific positions that conform to the general definition; and (iii) a procedure to consider non-enumerated cases.[217] The 1977 proposal, as adopted, established the concept of portfolio hedging and recognized cross-commodity hedges and hedges of anticipated production or unfilled anticipated requirements, provided such hedges were not recognized in the five last days of trading in any particular futures contract (the ''five-day rule'' in current § 1.3(z)(2)).[218]

The general definition of bona fide hedging in current § 1.3(z), as was the case when adopted in 1977, advises that a position should ''normally represent a substitute for . . . positions to be taken at a later time in a physical marketing channel,'' and requires such position to be ''economically appropriate to the reduction of risks in the conduct of a commercial enterprise,'' and where the risks arise from the potential change in value of assets, liabilities or services.[219] Such bona fide hedges also must have a purpose ''to offset price risks incidental to commercial cash or spot operations'' and must be ''established and liquidated in an orderly manner in accordance with sound commercial practices.'' Thus a bona fide hedge exemption was appropriate where there was a demonstrated physical price risk that had been recognized. This also applies, for example, to bona fide hedge exemptions for unfilled anticipated requirements, where processors or manufacturers are exposed to price risk on such unfilled anticipated requirements necessary for their manufacturing or processing.[220]

The 1977 proposed definition did not include the modifying adverb ''normally'' to the verb ''represent.''[221] The Commission explained in the 1977 preamble it intended to recognize bona fide hedging positions ''on the basis of net risk related to changes in the values reflected on balance sheets.''[222] The Commission introduced the adverb normally in the 1977 final rulemaking in order to make clear it would recognize as bona fide such balance sheet hedging and ''other [at the time] relatively infrequent but potentially important examples of risk reducing futures transactions'' that would otherwise not have met the general definition of bona fide hedging.[223] The Commission noted: ''One form of balance sheet hedging would involve offsetting net exposure to changes in currency exchange rates for the purpose of stabilizing the domestic dollar accounting value of assets which are held abroad. In the case of depreciable capital assets, such hedging transactions

[212] Section 404 of Public Law 93–463, October 23, 1974, (CFTC Act), amended section 4a(3) of the Act, deleting the statutory definition of bona fide hedging position or transaction and directing the newly-established Commission to issue a rule defining that term.

[213] Pending promulgation of a definition by the Commission, the Secretary of Agriculture promulgated § 1.3(z) pursuant to section 404 of the CFTC Act. 40 FR 11560, Mar. 12, 1975. This definition of bona fide hedging in new § 1.3(z) deviated in only minor ways from the hedging definition contained in section 4a(3) of the Act. The Commodity Exchange Commission subsequently issued conforming amendments to various rules. 40 FR 15086, Apr. 4, 1975.

[214] 40 FR 34627, Aug. 18, 1975. The Commission sought comment on many issues, including whether to include in the definition of bona fide hedging transactions and positions ''the practice of many traders which results in hedging of gross cash positions rather than a net cash position—so-called 'double hedging.' '' *Id.* at 34628. The Commission later noted ''that net cash positions do not necessarily measure total risk exposure and in such cases the hedging of gross cash positions does not constitute 'double hedging.' '' 42 FR 42748, 42750, Aug. 24, 1977.

[215] 40 FR 48688, Oct. 17, 1975. The Commission re-issued all regulations, with rule 1.3(z) essentially unchanged, in 1976. 41 FR 3192, 3195, Jan. 21, 1976.

[216] 42 FR 14832, Mar. 16, 1977.

[217] *Id.*

[218] 42 FR 42748, Aug. 24, 1977.

[219] 17 CFR 1.3(z)(1) (2010). The Commission cautions that the e-CFR version of § 1.3(z) reflects changes made by the vacated 2011 final rule.

[220] The Commission notes that the definition of bona fide hedging transactions or positions historically included an exemption for unfilled anticipated requirements. As the Commission stated in 1974, in its proposal to adopt § 1.3(z), the regulation on the hedging definition proposed by the Secretary of Agriculture was intended to comply with the intent of section 404 of Public Law 93–463, enacted October 23, 1974, as stated in the Conference Report accompanying HR. 13113, pp. 40–1. The Commission noted in its proposal that the new statutory language was intended to allow processors and manufacturers to hedge unfilled annual requirements. 39 FR 39731, Nov. 11, 1974.

[221] *See* 42 FR 42748, Aug. 24, 1977.

[222] *Id.*

[223] 42 FR at 42749.

might not represent a substitute for subsequent transactions in a physical marketing channel.'' [224]

With respect to the five-day rule in current § 1.3(z)(2) for anticipatory hedges of unfilled anticipated requirements, the Commission observed that historically there was a low utilization of this provision in terms of actual positions acquired in the futures market.[225] For cross commodity and short anticipatory hedge positions, the Commission did ''not believe that persons who do not possess or do not have a commercial need for the commodity for future delivery will normally wish to participate in the delivery process.'' [226]

In 1979, the Commission eliminated daily speculative trading volume limits and concluded such daily trading limits were ''not necessary to diminish, eliminate or prevent excessive speculation.'' [227] The Commission noted eliminating daily trading limits had no effect on the limits on the size of speculative positions which any one person may hold or control on a single contract market. The Commission also noted the speculative position limits apply to positions throughout the day as well as to positions at the close of the trading session.[228] The Commission continues to apply position limits throughout the day and will continue under this proposal.

In the aftermath of the silver futures market crisis during late 1979 to early 1980,[229] in 1981 the Commission adopted § 1.61, subsequently incorporated into § 150.5, requiring DCMs to adopt speculative position limits and providing an exemption for ''bona fide hedging positions as defined by a contract market in accordance with § 1.3(z)(1) of the Commission's regulations.'' [230] That rule permits DCMs to limit bona fide hedging positions which it determines are not in accord with sound commercial practices or exceed an amount which the exchange determines may be established or liquidated in an orderly fashion.

In 1986, in response to concerns raised in testimony regarding the constraints on investment decisions imposed by position limits, the House Committee on Agriculture, in its report accompanying the Commission's 1986 reauthorization legislation, instructed the Commission to reexamine its approach to speculative position limits and its definition of hedging.[231] Specifically, the Committee Report ''strongly urge[d] the Commission to undertake a review of its hedging definition . . . and to consider giving certain concepts, uses, and strategies 'non-speculative' treatment . . . whether under the hedging definition or, if appropriate, as a separate category similar to the treatment given certain spread, straddle or arbitrage positions . . . '' [232] The Committee Report singled out four categories of trading and positions that the Commission should consider recognizing as non-speculative: (i) ''Risk management'' trading by portfolio managers as an alternative to the concept of ''risk reduction;'' (ii) futures positions taken as alternatives to, rather than as temporary substitutes for, cash market positions; (iii) other positions acquired to implement strategies involving the use of financial futures including, but not limited to, asset allocation (altering portfolio exposure in certain areas such as equity and debt), portfolio immunization (curing mismatches between the duration and sensitivity of assets and liabilities to ensure that portfolio assets will be sufficient to fund the payment of liabilities), and portfolio duration (altering the average maturity of a portfolio's assets); and (iv) certain options trading, in particular the writing of covered puts and calls.[233]

The Senate Committee on Agriculture, Nutrition and Forestry, in its report on the 1986 CFTC reauthorization legislation, also directed the Commission to reassess its interpretation of bona fide hedging.[234] Specifically, the Senate Committee directed the Commission to consider ''whether the concept of prudent risk management [should] be incorporated in the general definition of hedging as an alternative to this risk reduction standard.'' [235]

The Commission heeded Congress's recommendation, and the Commission issued two 1987 interpretive statements regarding the definition of bona fide hedging. The first 1987 interpretative statement clarified the meaning of current § 1.3(z)(1).[236] The Commission interpreted the regulatory ''temporary substitute'' criterion [237] not to be a necessary condition for classification of positions as hedging. The Commission interpreted the ''incidental test'' [238] to be a ''requirement that the risks that are offset by a futures or option hedge must arise from commercial cash market activities.'' The Commission also noted bona fide hedges could include balance sheet and other trading strategies that are risk reducing, such as ''strategies that provide protection equivalent to a put option for an existing portfolio of securities.'' [239]

The second 1987 interpretative statement provides assistance to an exchange who may wish to recognize risk management exemptions from exchange speculative position limit rules.[240] ''The Commission note[d] that providing risk management exemptions to commercial entities who are typically engaged in buying, selling or holding cash market instruments is similar to a provision in the Commission's hedging definition, [namely], the risks to be hedged arise in the management and conduct of a commercial enterprise.'' [241] The Commission believed that it would be consistent with the objectives of section 4a of the Act and § 1.61 [now incorporated as § 150.5] for exchange rules to exempt from speculative limits a number of risk management positions in debt-based, equity-based and foreign currency futures and options.[242] Those positions included: Unleveraged long positions (covered by cash set aside); short calls on securities or currencies owned (*i.e.,* covered calls); and long positions in asset allocation strategies

[224] *Id.* at 42749 (n. 1).

[225] *Id.* at 42749. The five-day rule in current § 1.3(z)(2) for anticipatory hedges permits an exception for a person with a long anticipatory hedging need, for up to two months unfilled anticipated requirements.

[226] *Id.*

[227] 44 FR 7124, Feb. 6, 1979.

[228] *Id.* at 7125.

[229] *See, In re Nelson Bunker Hunt et al.,* CFTC Docket No. 85–12.

[230] 46 FR 50938, 50945, Oct. 16, 1981. With the passage of the Commodity Futures Modernization Act in 2000 and the Commission's subsequent adoption of the part 38 regulations covering DCMs in 2001 (66 FR 42256, Aug. 10, 2001), part 150's approach to exchange-set speculative position limits was incorporated as an acceptable practice under DCM Core Principle 5—Position Limitations and Accountability. 72 FR 66097, 66098 n.1, Nov. 27, 2007.

[231] House Committee on Agriculture, Futures Trading Act of 1986, H.R. Rep. No. 624, 99th Cong., 2d Sess. 44–46 (1986).

[232] *Id.* at 46.

[233] *Id.*

[234] Senate Committee on Agriculture, Nutrition and Forestry, Futures Trading Act of 1986, S. Rep. No. 291, 99th Cong., 2d Sess. at 21–22 (1986).

[235] *Id.* at 22.

[236] *See,* Clarification of Certain Aspect of the Hedging Definition, 52 FR 27195, Jul. 20, 1987 (July 1987 Interpretative Statement).

[237] In current § 1.3(z)(1), the phrase ''where such transactions or positions normally represent a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel'' has been termed the ''temporary substitute criterion.'' (Emphasis added.)

[238] In current § 1.3(z)(1), the phrase ''price risks incidental to commercial cash or spot operations'' has been termed the ''incidental test.''

[239] 52 FR at 27197.

[240] *See,* Risk Management Exemptions from Speculative Position Limits Approved under Commission Regulation 1.61, 52 FR 34633, Sep. 14, 1987.

[241] *Id.* at 34637.

[242] *Id.* at 34636.

covered by hedged debt securities or currencies owned.[243]

In 1987, the Commission also added an enumerated hedging position for spread positions which offset unfixed-price cash sales and unfixed-price cash purchases that are priced basis different delivery months in a futures contract (that is, floating-price cash purchases coupled with floating-price cash sales).[244] In this regard, the Commission extended the cross-commodity hedging provisions to offsets of such coupled floating-price cash contracts that were not cash market transactions in the same commodity underlying the futures contract.[245]

The Commission adopted federal limits on soybean meal and soybean oil futures contracts in 1987, in response to a petition by the Chicago Board of Trade.[246] In the final rule, the Commission noted: ''Crush positions allow the processor to determine or fix his processing margin in advance and are included within the exemptions permitted for anticipatory hedging under Commission Rule 1.3(z)(2).'' [247] Specifically, the Commission noted for a crush position established by a soybean processor, the short positions in soybean oil and soybean meal futures would be permitted to the extent of twelve months unsold anticipated production; and the long positions in soybean futures would be permitted to the extent of twelve months unfilled anticipated requirements. The Commission declined to adopt an exemption for a reverse crush position. The Commission stated its belief, based upon comments received and its own analysis, ''that there are important differences between the crush and reverse crush positions from the standpoint of bona fide hedging by soybean processors.'' The results of a crush position, plus or minus basis variation, are known once the position is established. In contrast, the Commission noted with a reverse crush spread position, ''the intended results transpire only if, and when, the futures markets reflect the expected or anticipated more favorable crushing margin and the position can be lifted.'' Accordingly, the Commission noted it did not appear appropriate to recognize the reverse crush spread position as an enumerated category of bona fide hedging.[248]

In 2007, the Commission proposed a risk management exemption to federal position limits, in addition to the bona fide hedging exemption.[249] A risk management position would have been defined as a futures or futures equivalent position held as part of a broadly diversified portfolio of long-only or short-only futures or futures equivalent positions, that is based on either tracking a broadly diversified index for clients or a portfolio diversification plan that included an exposure to a broadly diversified index. In either case, the exemption would have been conditioned on the futures positions being passively managed, unleveraged, and outside of the spot month. The Commission withdrew that proposal in 2008, citing a lack of consensus.[250]

In March of 2009, the Commission issued a concept release on whether to eliminate the bona fide hedge exemption for certain swap dealers and create a new limited risk management exemption from speculative position limits.[251] The Commission explained that, beginning in 1991, the Commission had granted bona fide hedge exemptions under § 1.47 to a number of swap intermediaries who were seeking to manage price risk on their books as a result of their serving as counterparties to their swap clients in commodity index swap contracts or commodity swap contracts.[252] The swap clients included pension funds and other passive investors who were not using swaps to offset risks in the physical marketing channel. In order to protect itself from the risks of such swaps, the swap intermediary would establish a portfolio of long futures positions in the commodities making up the index or the commodity underlying the swap, in such amounts as would offset its exposure under the swap transaction. By design, the commodity index did not include contract months in the spot month. The exemptions did not cover positions carried into the spot month. The comments on the March 2009 concept release were about equally divided between those who favored eliminating the bona fide hedge exemption for swap dealers (or restricting the exemption to positions offsetting swap dealers' exposure to traditional commercial market users) and those who favored retaining the swap dealer hedge exemption in its current form, or some variation thereof.[253]

In January of 2010, the Commission proposed an integrated speculative position framework for the major energy contracts listed on DCMs.[254] The proposed rules would not have recognized futures and option transactions offsetting exposure acquired pursuant to swap dealing activity as bona fide hedges. Instead, upon compliance with several conditions including reporting and disclosure obligations, the proposed regulations would have allowed swap dealers to seek a limited exemption from the proposed speculative position limits for the major energy contracts.[255] The proposed framework was withdrawn after enactment of the Dodd-Frank Act, which the Commission interprets as expanding the range of derivative contracts, beyond contracts listed on DCMs, on which the Commission must impose position limits.

Since 1974, the Commission has had authority under the Act to define the term bona fide hedging position. With the enactment on July 21, 2010 of the Dodd-Frank Act, section 4a(c)(1) of the Act,[256] continues to provide that position limits do not apply to positions shown to be bona fide hedging positions as defined by the Commission.[257]

However, Dodd-Frank added section 4a(c)(2) of the Act, which the Commission interprets as directing the Commission to narrow the bona fide hedging position definition for physical commodities from the definition found in current § 1.3(z)(1), as discussed further below.[258] Separately, Dodd-Frank added section 4a(a)(7) of the Act to give the Commission plenary authority to grant general exemptive relief from the position limit rules.[259]

On November 18, 2011, the Commission adopted part 151 to establish a position limits regime for

[243] *Id.*

[244] 52 FR 38914, 38919, Oct. 20, 1987.

[245] *Id.* at 38922.

[246] Petition for rulemaking of the CBOT, dated July 24, 1986, cited in 52 FR 6814, Mar. 5, 1987.

[247] 52 FR 38914, 38920, Oct. 20, 1987.

[248] *Id.* The Commission noted at that time that the determination of whether a reverse crush position is bona fide hedging should be made on a case-by-case basis under § 1.47.

[249] 72 FR 66097, Nov. 27, 2007.

[250] 73 FR 32261, Jun. 6, 2008.

[251] 74 FR 12282, Mar. 24, 2009.

[252] *Id.* at 12284.

[253] The comments are available for review on the Commission's Web site at *http://www.cftc.gov/LawRegulation/PublicComments/09-004*.

[254] 75 FR 4144, Jan. 26, 2010 (withdrawn 75 FR 50950, Aug. 18, 2010).

[255] 75 FR at 4152.

[256] 7 U.S.C. 6a(c)(1).

[257] *Id.* The Dodd-Frank Act did not change the language found in prior 7 U.S.C. 6a(c) (2010).

[258] *See infra* discussion of ''temporary substitute test.''

[259] Section 4a(a)(7) of the Act provides: ''The Commission, by rule, regulation, or order, may exempt, conditionally or unconditionally, any person or class of persons, any swap or class of swaps, any contract of sale of a commodity for future delivery or class of such contracts, any option or class of options, or any transaction or class of transactions from any requirement it may establish under this section with respect to position limits.'' 7 U.S.C. 6a(a)(7).

twenty-eight exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts.[260] In connection with issuing the part 151 limits, the Commission defined bona fide hedging transactions or positions in § 151.5(a) and enumerated eight transactions or positions that would constitute bona fide hedging transactions or positions and, thus, would be exempt from the part 151 limits.[261]

In addition to the exemptions enumerated in § 151.5(a)(2) and (5) provided that, ''Any person engaging in other risk reducing practices commonly used in the market which they believe may not be specifically enumerated in § 151.5(a)(2) may request relief from Commission staff under § 140.99 of this chapter [262] or the Commission under section 4a(a)(7) of the Act concerning the applicability of the bona fide hedging transaction exemption.'' [263]

On January 20, 2012, the Working Group of Commercial Energy Firms (the ''Working Group'') filed a petition pursuant to both section 4a(a)(7) of the Act and § 151.5(a)(5) (the ''Working Group Petition'') [264] requesting that the Commission ''grant exemptive relief for [ten] classes of risk-reducing transactions described [in the petition] to the extent that such transactions are not covered by [§§] 151.5(a)(1) or (2) of the Position Limit Rules or, in the alternative, clarify that such classes of transactions qualify as 'bona fide hedging transactions or positions' within the meaning of [§§] 151.5(a)(1) and (2); [(''Requests One–Ten'')] and provide exemptive relief regarding the definition of (a) ''spot month'' set forth in [§] 151.3(c) of the Position Limit Rules, and (b) ''swaption'' set forth in [§] 151.1 of the Position Limit Rules [('Other Requests)].'' [265] In connection with any relief ultimately granted as a result of the Petition, the Working Group also requested that the Commission ''confirm that any relief granted is generally applicable to the entire market.'' [266]

In addition to the Working Group Petition, on March 13, 2012, the American Petroleum Institute (''API'') also filed a petition pursuant to both section 4a(a)(7) of the Act and § 151.5(a)(5) (the ''API Petition'').[267] The API Petition generally endorsed the Working Group petition and requested that the Commission recognize as bona fide hedging transactions certain routine energy market transactions that are priced at monthly average index prices.[268] The request in the API Petition is essentially a restatement of Requests One through Three of the Working Group Petition. The API Petition also requested relief for pass-through swaps.

Further, the CME Group, on April 26, 2012, filed a petition pursuant to section 4a(a)(7) of the Act and § 151.5(a)(5) (the ''CME Petition'').[269] The CME Petition generally requested that the Commission recognize as bona fide hedging transactions certain purchases by persons engaged in processing, manufacturing or feeding that were permitted under § 1.3(z)(2)(ii)(C) during the last five trading days in physical-delivery contracts, not to exceed anticipated requirements for that month and the next succeeding month. The request in the CME Petition is substantively similar to Request Eight of the Working Group Petition.

With the court's September 28, 2012, order vacating part 151, the Commission now re-proposes a definition of bona fide hedging position.

b. Proposed Definition of Bona Fide Hedging Position

The Commission proposes to delete § 1.3(z), the current definition of ''bona fide hedging transactions or positions,'' and replace it with a new definition of ''bona fide hedging position'' in § 150.1.[270] Section 4a(c)(1) of the Act, as added by the Dodd-Frank Act, authorizes the Commission to define bona fide hedging positions ''consistent with the purposes of this Act.'' [271] The proposed definition of bona fide hedging position builds on the Commission's history, both in administering a regulatory exemption to federal limits and in providing guidance to exchanges in establishing exchange limits, and is grounded for physical commodities on the new requirements in section 4a(c)(2) of the Act, as amended by section 737 of the Dodd-Frank Act in July 2010.[272]

Organization. The proposed definition of bona fide hedging position is organized into six sections: an opening paragraph with two general requirements for all hedges; and five numbered paragraphs (paragraphs (1)–(5)). Paragraph (1) of the proposed definition sets forth requirements for hedges of an excluded commodity, and incorporates guidance on risk management exemptions that may be adopted by an exchange.[273] Paragraph (2) lists requirements for hedges of a physical commodity. Paragraphs (3) and (4) list enumerated exemptions. Paragraph (5) specifies the requirements for cross-commodity hedges.

c. General Requirements for All Bona Fide Hedges—Opening Paragraph

The opening paragraph of the proposed definition sets forth two general requirements for any legitimate hedging position: (i) The purpose of the position must be to offset price risks incidental to commercial cash operations (the ''incidental test''); and

[260] *See generally* 76 FR 71626, Nov. 18, 2011.

[261] *See* 17 CFR 151.5(a)(2)(i)–(viii). The Commission also recognized pass-through swaps and pass-through swap offsets as bona fide hedging transactions. 17 CFR 151.5(a)(3)–(4).

[262] Section 140.99 sets out general procedures and requirements for requests to Commission staff for exemptive, no-action and interpretative letters.

[263] 17 CFR § 151.5(a)(5).

[264] The Working Group Petition is available at *http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/wgbfhpetition012012.pdf.* The Working Group supplemented the petition in a letter dated April 17, 2012, available at *http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/workinggroupltr041712.pdf.* As noted in their submission, the Working Group is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to, among others, industrial, commercial and residential consumers. Members of the Working Group and their affiliates actively trade futures and swaps and they assert that they would be materially impacted by position limit rules under part 151.

[265] *See* Working Group Petition at 1.

[266] *See* Working Group Petition at 3. In letters dated March 1,2012, and March 26, 2012, respectively, a group of three energy trade associations (Edison Electric Institute, American Gas Association, and Electric Power Supply Association), and the Futures Industry Association submitted comments in support of the Working Group Petition, available at *http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/eei-aga-epsa_comments.pdf* and *http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/fialtr032612.pdf.*

[267] The API Petition is available at *http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/apiltr031312.pdf.* As noted in their submission, API is a national trade association representing more than 450 oil and natural gas companies. Its members transact in physical and financial, exchange-traded, and over-the-counter markets primarily to hedge or mitigate commercial risks associated with their core business of delivering energy to wholesale and retail customers.

[268] *See* API Petition at 1.

[269] The CME Petition is available at *http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/cmeltr042612.pdf.*

[270] The proposed definition does not reference ''transactions'' because the Commission has not had trading volume limits on transactions since 1979. *See generally* Elimination of Daily Speculative trading Limits, 44 FR 7124, Feb. 6, 1979.

[271] 7 U.S.C. 6a(c)(1).

[272] 7 U.S.C. 6a(c)(2).

[273] Regarding the definition of bona fide hedging positions in excluded commodities, the Commission notes this proposed definition also would provide flexibility to exchanges adopting exemptions for securities futures contracts consistent with § 41.25(a)(3)(iii).

(ii) the position must be established and liquidated in an orderly manner in accordance with sound commercial practices (the ''orderly trading requirement''). These general requirements are found in current § 1.3(z)(1).[274]

Incidental test. Consistent with its prior interpretation of the incidental test under § 1.3(z)(1), discussed above, the Commission intends the proposed incidental test to be a requirement that the risks offset by a commodity derivative contract hedging position must arise from commercial cash market activities.[275] The Commission believes this requirement is consistent with the statutory guidance to define bona fide hedging positions to permit hedging ''legitimate anticipated business needs.'' [276] In the absence of a requirement for a legitimate business need, the Commission believes it would be difficult to distinguish between hedging and speculative activities. The Commission believes the concept of commercial cash market activities is also embodied in the economically appropriate test for physical commodities in section 4a(c)(2) of the Act, discussed below. The proposed incidental test amends the incidental test in current § 1.3(z)(1) by clarifying that forward commercial operations may also serve as the basis for a bona fide hedging position.[277] This is consistent with the Commission's long-standing recognition of fixed-price purchase and fixed-price sales contracts (which may specify forward delivery dates) as the basis of certain enumerated hedges in current § 1.3(z)(2).

Orderly trading requirement. The proposed orderly trading requirement is intended to impose on bona fide hedgers a duty of ordinary care when entering, maintaining and exiting the market in the ordinary course of business and in order to avoid as practicable the potential for significant market impact in establishing, maintaining or liquidating a position in excess of position limitations.[278] The Commission believes the proposed orderly trading requirement is consistent with the policy objectives of position limits to diminish, eliminate or prevent excessive speculation and to ensure that the price discovery function of the underlying market is not disrupted.[279] The Commission believes the orderly trading requirement is particularly important since the Commission intends to set the initial levels of position limits at the outer bound of the range of levels of position limits that may serve to maximize the statutory policy objectives. Thus, bona fide hedgers likely would only need an exemption for extraordinarily large positions.

The Commission believes that negligent trading, practices, or conduct should be a sufficient basis for the Commission to disallow a bona fide hedging exemption. The Commission believes that an evaluation of ''orderly trading'' should be based on the totality of the facts and circumstances as of the time the person engaged in the relevant trading, practices, or conduct—*i.e.,* the Commission intends to consider whether the person knew or should have known, based on the information available at the time, he or she was engaging in the conduct at issue.

The Commission proposes to apply its policy regarding orderly markets for purposes of the disruptive trading practice prohibitions, to its orderly trading requirement for purposes of position limits. ''The Commission's policy is that an orderly market may be characterized by, among other things, parameters such as a rational relationship between consecutive prices, a strong correlation between price changes and the volume of trades, levels of volatility that do not dramatically reduce liquidity, accurate relationships between the price of a derivative and the underlying such as a physical commodity or financial instrument, and reasonable spreads between contracts for near months and for remote months.'' [280] Further, in fulfilling their duty of ordinary care when entering, maintaining and exiting a position, market participants should assess market conditions and consider how their trading practices and conduct affect the orderly execution of transactions when establishing, maintaining or liquidating a position in excess of a speculative position limit.

d. Requirements and Guidance for Hedges in an Excluded Commodity—Paragraph (1)

The proposed definition of bona fide hedging position for contracts in an excluded commodity [281] includes the general requirements in the opening paragraph and would require that the position is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise (the ''economically appropriate'' test) and is either (i) specifically enumerated in paragraphs (3)–(5) of the definition of bona fide hedging position; or (ii) recognized as a bona fide hedging position by a DCM or SEF consistent with the guidance on risk management exemptions in proposed appendix A to part 150.[282]

The economically appropriate test in section 4a(c)(2) of the Act, applicable to physical commodities, also should apply to excluded commodities because it has long been a fundamental requirement of a bona fide hedging position.[283] Current § 1.3(z)(1) contains the economically appropriate test.[284]

[274] In relevant part, current § 1.3(z)(1) provides: ''Notwithstanding the foregoing, no transaction or position shall be classified as bona fide hedging for purposes of section 4a of the Act unless their purpose is to offset price risks incidental to commercial cash or spot operations and such position are established and liquidated in an orderly manner in accordance with sound commercial practices and [unless other] provisions [of this definition] have been satisfied.'' 17 CFR 1.3(z)(1). The second characteristic was contained in vacated § 151.5(a)(1)(v).

[275] *See,* Clarification of Certain Aspect of the Hedging Definition, 52 FR 27195, Jul. 20, 1987 (July 1987 interpretative statement).

[276] 7 U.S.C. 6a(c)(1).

[277] The incidental test was not contained in vacated § 151.5(a)(1). This omission was not discussed in the preambles to the proposed or final rule. However, the incidental test was retained in amended § 1.3(z)(1) for excluded commodities. 76 FR at 71683.

[278] *Compare,* section 4c(a)(5)(B) of the Act, which makes it unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that, for example, demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period. 7 U.S.C. 6c(a)(5)(B). Section 4c(a)(6) of the Act authorizes the Commission to promulgate such ''rules and regulations as, in the judgment of the Commission, are reasonable necessary to prohibit . . . any other trading practice that is disruptive of fair and equitable trading.'' 7 U.S.C. 6c(a)(6).

[279] *See* sections 4a(3)(B)(i) and (iv) of the Act. 7 U.S.C. 6a(3)(B)(i) and (iv).

[280] *See* Interpretive Guidance and Policy Statement on Antidisruptive Practices Authority, 78 FR 31890, 31895–96 (May 28, 2013) (available at *http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-12365a.pdf*).

[281] ''Excluded commodity'' is defined in section 1a(19) of the Act. 7 U.S.C. 1a(19).

[282] *See* the discussion below of proposed § 150.5(b)(5), requiring exchange hedge exemptions to exchange limits on contracts in an excluded commodity to conform to the definition of bona fide hedging position in § 150.1. The Dodd-Frank Act expanded the authority of the Commission with respect to core principles applicable to exchange traded contracts in an excluded commodity, but did not address directly the definition of bona fide hedging positions for excluded commodities. The Dodd-Frank Act amended the core principles for DCMs and established core principles for SEFs, authorizing the Commission, by rule or regulation, to restrict the reasonable discretion of the exchange in complying with core principles. 7 U.S.C. 7(d)(1)(B) and 7b–3(f)(1)(B).

[283] *See, e.g.,* the definition of bona fide hedging promulgated by the Commission's predecessor in § 1.3(z) of its regulations in 1975. 40 FR 11560, 11561, Mar. 12, 1975 (''Bona fide hedging transactions or positions . . . shall mean sales of or short positions in any commodity for future delivery . . . ,'' (emphasis added)).

[284] The Commission adopted this requirement in § 1.3(z)(1) in 1977. 42 FR 42748, 42751, Aug. 24, 1977. Prior to that time, the concept of economically appropriate to the reduction of risk in

Continued

The Commission notes that the concept of the reduction of risk was long embodied in the statutory concept of ''offset'' prior to 1974.[285] The economically appropriate test is discussed further, below.

Under the proposed definition, an exchange would be permitted to grant an exemption based on its rules that were consistent with the enumerated exemptions in paragraphs (3)–(5) of the proposed definition of bona fide hedging position. Current § 1.3(z)(1) also requires a bona fide hedging position to be either (i) an enumerated exemption in current § 1.3(z)(2) or (ii) a non-enumerated exemption under current § 1.3(z)(3) (a non-enumerated exemption may be granted under current § 1.47 as a risk management exemption). The enumerated exemptions in paragraphs (3)–(5) of the proposed definition of bona fide hedging position contain all of the enumerated exemptions in current § 1.3(z)(2). The specifically enumerated exemptions also are discussed separately, below.

The Commission is proposing to incorporate as guidance in appendix A to part 150 the concepts in the 1987 risk management exemptions interpretative statement.[286] The Commission believes that it would be consistent with the objectives of section 4a of the Act for exchange rules to exempt from speculative limits a number of risk management positions in commodity derivative contracts in an excluded commodity. Such risk management exemption positions would include, but not be limited to, three types of exemptions for: (i) Unleveraged long positions (covered by cash set aside); (ii) short calls on securities or currencies owned (*i.e.,* covered calls); and (iii) long positions in asset allocation strategies covered by hedged debt securities or currencies owned (*i.e.,* unleveraged synthetic positions).[287] The Commission is proposing to withdraw the 1987 risk management exemption interpretative statement in light of incorporating its concepts in proposed appendix A to part 150, thus rendering that interpretative statement redundant. The Commission requests comment on all aspects of proposed appendix A to part 150.

In addition, under the proposed guidance for excluded commodities and as is currently the case, there need not be any temporary substitute test for a bona fide hedging position in an excluded commodity. This is consistent with the Commission's July 1987 interpretative statement that the temporary substitute component need not apply to a bona fide hedging position in an excluded commodity.[288]

e. Requirements for Hedges in a Physical Commodity—Paragraph (2)

The Commission is proposing to implement the statutory directive of section 4a(c)(2) of the Act in paragraph (2) of the proposed definition of bona fide hedging position under § 150.1. The proposed definition for physical commodities would also include the general requirements of the opening paragraph, as is the case under current § 1.3(z)(1) and as discussed above.

Section 4a(c)(2) of the Act directs the Commission to define what constitutes a bona fide hedging position for futures and option contracts on physical commodities listed by DCMs.[289] The Commission proposes to apply the same definition to (i) swaps that are economically equivalent to futures contracts and (ii) direct-access linked FBOT futures contracts that are economically equivalent to futures contracts listed by DCMs.[290] Applying the same definition to economically equivalent contracts would promote administrative efficiency. Applying the same definition to economically equivalent contracts also is consistent with congressional intent as embodied in the expansion of the Commission's authority to apply position limits to swaps (*i.e.,* those that are economically equivalent to futures and swaps that serve a significant price discovery function) and to direct-access linked FBOT contracts.[291]

Paragraph (2)(i) of the proposed definition would recognize as bona fide a position in a commodity derivative contract that (i) represents a substitute for positions taken or to be taken at a later time in the physical marketing channel (i.e., the ''temporary substitute'' test); (ii) is economically appropriate to the reduction of risks (i.e., the ''economically appropriate'' test); and (iii) arises from the potential change in value of assets, liabilities or services (i.e., the ''change in value'' requirement), provided the position is enumerated in paragraphs (3) through (5) of the definition, as discussed below. This subparagraph would incorporate the provisions of section 4a(c)(2)(A) of the Act for futures and option contracts and also would include the provisions of section 4a(c)(2)(B)(ii) of the Act, regarding swaps, by using the term commodity derivative contracts, which includes swaps, futures and futures option contracts.

Temporary substitute test. The temporary substitute test requires that a bona fide hedging position must represent ''a substitute for . . . positions taken or to be taken at a later time in a physical marketing channel.'' [292] Paragraph (2)(i) of the proposed definition incorporates the temporary substitute test of section 4a(c)(2)(A)(i) of the Act. The express language of section 4a(c)(2)(A)(i) of the Act requires the temporary substitute test to be a necessary condition for classification of positions in physical commodities as bona fide hedging positions. Section 4a(c)(2)(A) of the Act incorporates many aspects of the general definition of bona fide hedging in current § 1.3(z)(1). However, there are significant differences. Section 4a(c)(2)(A)(i) of the Act does not include the adverb ''normally'' to modify the verb ''represents'' in the phrase ''represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing

the operation of a commercial enterprise was not separately articulated, but was reflected in the incidental test (''unless their bona fide purpose is to offset price risks incidental to commercial cash or spot operations'') in § 1.3(z)(1) as amended in 1975. 40 FR 11560, 11561, Mar. 12, 1975. Current § 150.5(d) provides guidance to DCMs that exchange regulations for bona fide hedging position exemptions (including exemptions for excluded commodity contracts) should be granted in accordance with current § 1.3(z)(1). 17 CFR 150.5(d) See, for example, Chicago Mercantile Exchange Rule 559.A., Bona Fide Hedging Positions, available at *http://www.cmegroup.com/rulebook/CME/I/5/5.pdf*, that provides: ''The Market Regulation Department may grant exemptions from position limits for bona fide hedge positions as defined by CFTC Regulation § 1.3(z)(1). Approved bona fide hedgers may be exempted from emergency orders that reduce position limits or restrict trading.''

[285] Prior to 1974, section 4a of the Act defined bona fide hedging transactions as: ''For the purposes of this paragraph, bona fide hedging transactions shall mean sales of any commodity for future delivery on or subject to the rules of any board of trade to the extent that such sales are offset in quantity by the ownership or purchase of the same cash commodity or, conversely, purchases of any commodity for future delivery on or subject to the rules of any board of trade to the extent that such purchases are offset by sales of the same cash commodity.'' 7 U.S.C. 6a (1940).

[286] 52 FR 34633, Sep. 14, 1987.

[287] *Id.* at 34626.

[288] 52 FR 27195, Jul. 20, 1987 (July 1987 Interpretative Statement). *See also* House of Representatives Committee Report quoted at 52 FR 34633, 34634, September 14, 1987, regarding ''futures positions taken as alternatives rather than temporary substitutes for cash market positions.'' H.R. Rep No. 624, 99th Cong., 2d Sess. 1, 45–46 (1986). However, the Commission is proposing to withdraw the July 1987 Interpretative Statement, since the temporary substitute test was added by the Dodd-Frank Act as a statutory requirement for a bona fide hedging position in a physical commodity. 7 U.S.C. 4a(c)(2)(A)(i).

[289] 7 U.S.C. 6a(c)(2).

[290] This is consistent with the approach the Commission took in vacated § 151.5. 76 FR 71643 n.168.

[291] 7 U.S.C. 6a(a)(5)–(6).

[292] 7 U.S.C. 6a(c)(2)(A)(i).

channel.'' [293] In addition, Congress provided explicit requirements for recognizing swaps as bona fide hedging positions in section 4a(c)(2)(B), recognizing positions that reduce either the risk of swaps that meet the requirements of section 4a(c)(2)(A) of the Act or swaps that are executed opposite a counterparty whose transaction would qualify as bona fide under section 4a(c)(2)(A) of the Act. The statutory requirements are more stringent than the conditions for swap risk management exemptions the Commission previously granted under § 1.3(z)(3) and § 1.47. As discussed above, the Commission granted risk management exemptions for persons to offset the risk of swaps that did not represent substitutes for transactions or positions in a physical marketing channel, neither by the intermediary nor the counterparty. Thus, positions that reduce the risk of such speculative swaps would no longer meet the requirements for a bona fide hedging transaction or position under the new statutory criteria.

Economically appropriate test. Paragraph (2)(A)(ii) of the proposed definition incorporates the economically appropriate test of section 4a(c)(2)(A)(ii) of the Act. This statutory provision mirrors the provisions in current § 1.3(z)(1). The Commission has provided interpretations and guidance over the years as to the meaning of ''economically appropriate'' in current § 1.3(z)(1). For example, the Commission has indicated that hedges of processing margins by a processor, such as a soybean processor that establishes long positions in the soybean contract and short positions in the soybean meal contact and the soybean oil contract, may be economically appropriate.[294]

By way of example, a manufacturer may anticipate using a commodity that it does not own as an input to its manufacturing process; however, the manufacturer expects to change output prices to offset substantially a change in price of the input commodity. For example, processing by a soybean crush operation or a fuel blending operation may add relatively little value to the price of the input commodity. In such circumstances, it would be economically appropriate for the processor to offset the price risks of both the unfilled anticipated requirement for the input commodity and the unsold anticipated production; such a hedge would, for example, fully lock in the value of soybean crush processing. Alternatively, a processor may wish to establish a calendar month hedge solely in terms of the input commodity, to offset the price risk of the anticipated input commodity and to cross-commodity hedge the unsold anticipated production. In such an alternative, a processor has hedged the commercial enterprise's exposure to the value of the input commodity at the expected time of acquisition and to the input commodity's value component of the processed commodity at the expected later time of production and sale. Unfilled anticipated requirements, unsold anticipated production and cross-commodity hedging are also discussed as enumerated hedges, below.

The Commission affirms that gross hedging may be appropriate under certain circumstances, when net cash positions do not measure total risk exposure due to differences in the timing of cash commitments, the location of stocks, and differences in grades or types of the cash commodity being hedged.[295] By way of example, a merchant may have sold a certain quantity of a commodity for deferred delivery in the current year (*i.e.,* a fixed-price cash sales contract) and purchased that same quantity of that same commodity for deferred receipt in the next year (*i.e.,* a fixed-price cash purchase contract). Such a merchant would be exposed to value risks in the two cash contracts arising from different delivery periods (that is, from a timing difference). Thus, although the merchant has bought and sold the same quantity of the same commodity, the merchant may elect to offset the price risk arising from the cash purchase contract separately from the price risk arising from the cash sales contract, with each offsetting commodity derivative contract regarded as a bona fide hedging position. However, if such a merchant were to offset only the cash purchase contract, but not the cash sales contract (or vice versa), then it reasonably would appear the offsetting commodity derivative contract would result in an increased value exposure of the enterprise (that is, the risk of changes in the value of the cash commodity contract that was not offset is likely to be higher than the risk of changes in the value of the calendar spread difference between the nearby and deferred delivery period) and, so, the commodity derivative contract would not qualify as a bona fide hedging position.

In order for a position to be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, the enterprise generally should take into account all inventory or products that the enterprise owns or controls, or has contracted for purchase or sale at a fixed price. For purposes of reporting cash market positions under current part 19, the Commission historically has allowed a reporting trader to ''exclude certain products or byproducts in determining his cash positions for bona fide hedging'' if it is ''the regular business practice of the reporting trader'' to do so.[296] The Commission has determined to clarify the meaning of ''economically appropriate'' in light of this reporting exclusion of certain cash positions.

Originally, the Commission intended for the optional part 19 reporting exclusion to cover only cash positions that were not capable of being delivered under the terms of any derivative contract.[297] The Commission differentiated between ''products and byproducts'' of a commodity and the underlying commodity itself, the former capable of exclusion from part 19 reporting under normal business practices due to the absence of any derivative contract in such product or byproduct.[298] This intention ultimately evolved to allow cross-commodity hedging of products and byproducts of a commodity that were not necessarily deliverable under the terms of any derivative contract.[299]

[293] In contrast and as noted above, in current § 1.3(z)(1), the phrase ''where such transactions or positions normally represent a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel'' has been termed the ''temporary substitute'' criterion. (Emphasis added.)

[294] 52 FR 38914, 38920, Oct. 20, 1987.

[295] 42 FR 14832, 14834, Mar. 16, 1977.

[296] *See* current § 19.00(b)(1) (providing that ''[i]f the regular business practice of the reporting trader is to exclude certain products or byproducts in determining his cash position for bona fide hedging . . . , the same shall be excluded in the report''). 17 CFR 19.00(b)(1).

[297] 43 FR 45825, 45827, Oct. 4, 1978 (explaining that the allowance for eggs not kept in cold storage to be excluded from reporting a cash position in eggs under part 19 ''was appropriate when the only futures contract being traded in fresh shell eggs required delivery from cold storage warehouses.'').

[298] *See id.* Prior to the Commission's revision of the part 19 reporting exclusion for eggs, the exclusion allowed ''eggs not in cold storage or certain egg products'' not to be reported as a cash position. 26 FR 2971, Apr. 7, 1961 (emphasis added). Additionally, the title to the revised exclusion read, ''Excluding products or byproducts of the cash commodity hedged.'' *See* 43 FR 45825, 45828 (Oct. 4, 1978). So, in addition to a commodity itself that was not deliverable under any derivative contract, the Commission also recognized a separate class of ''products and byproducts'' that resulted from the processing of a commodity that it did not believe at the time were capable of being hedged by any derivative contract for purposes of a bona fide hedge.

[299] *See* 42 FR 42748, Aug. 24, 1977. Cross-commodity hedging is discussed as an enumerated hedge, below.

The instructions to current Form 204 go a step further than current § 19.00(b)(1) by allowing for a reporting trader to exclude ''certain *source commodities,* products, or byproducts in determining [ ] cash positions for bona fide hedging.'' (Emphasis added.) In line with its historical approach to the reporting exclusion, the Commission does not believe that it would be economically appropriate to exclude large quantities of a source commodity held in inventory when an enterprise is calculating its value at risk to a source commodity and it intends to establish a long derivatives position as a hedge of unfilled anticipated requirements. As explained in the revisions to part 19, discussed below, a source commodity itself can only be excluded from a calculation of a cash position if the amount is de minimis, impractical to account for, and/or on the opposite side of the market from the market participant's hedging position.

Change in value requirement. Paragraph (2)(A)(iii) of the proposed definition incorporates the potential change in value requirement of section 4a(c)(2)(A)(iii) of the Act. This statutory provision largely mirrors the provisions in current § 1.3(z)(1).[300] The Commission notes that it uses the term ''price risk'' to mean a ''potential change in value.'' To satisfy the change in value requirement, the purpose of a bona fide hedge must be to offset price risks incidental to a commercial enterprise's cash operations. The change in value requirement is embedded in the concept of offset of price risks.

Pass-through Swaps and Offsets. Subparagraph (2)(B) of the proposed definition would recognize as bona fide a commodity derivative contract that reduces the risk of a position resulting from a swap executed opposite a counterparty for which the position at the time of the transaction would qualify as a bona fide hedging position under subparagraph (2)(A). This provision generally mirrors the provisions of section 4a(c)(2)(B)(i) of the Act,[301] and clarifies that the swap itself is also a bona fide hedging position to the extent it is offset. However, the Commission is proposing that it will not recognize as bona fide hedges the offset of such swaps with physical-delivery contracts during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery commodity derivative contract (the ''five-day'' rule).

The Commission is proposing to use its exemptive authority under section 4a(a)(7) of the Act to net positions in futures, futures options, economically equivalent swaps and direct-access linked FBOT contracts in the same referenced contract for purposes of single month and all-months-combined limits under proposed § 150.2, discussed below.[302] Thus, a pass-through swap exemption would not be necessary for a swap portfolio in referenced contracts that would automatically be netted with futures and futures options in the same referenced contract outside of the spot month under the proposed rules. The Commission historically has permitted non-enumerated risk management positions under § 1.3(z)(3) and § 1.47. Almost all exemptions historically requested and granted under these provisions were for risk management of swap positions related to the agricultural commodities subject to federal position limits under part 150.

As noted above, the proposed rule would impose a five-day rule during the spot-month. In the risk management exemptions for swaps issued to date by the Commission under current § 1.3(z)(3) and § 1.47, the exemptions for swap offsets did not run to the spot month. As discussed above, the Commission has long imposed a five-day rule in current § 1.3(z)(2) for other exemptions. For example, for hedges of unfilled anticipated requirements, the Commission observed that historically there was a low utilization of this provision in terms of actual positions acquired in the futures market.[303] For cross-commodity and short anticipatory hedge positions, the Commission did not believe that persons who do not possess or do not have a commercial need for the commodity for future delivery will normally wish to participate in the delivery process.[304] In the instant cases of swaps, the Commission has observed generally low usage among all traders of the physical-delivery futures contract during the spot month, relative to the existing exchange spot-month position limits.[305] The Commission invites comments as to the extent to which traders actually have offset the risk of swaps during the spot month in a physical-delivery futures contract with a position in excess of an exchange's spot-month position limit.

The Commission has reviewed its historical policy position regarding the five-day rule for speculative limits in the spot month in light of position information, including positions in physical-delivery energy futures contracts.[306] For example, the Commission reviewed three years of confidential large trader data in cash-settled and physical-delivery energy contracts. The review covered actual positions held in the physical-delivery energy futures markets during the three-day spot period, among all traders (including those who had received hedge exemptions from their DCM). It showed that, historically, there have been relatively few positions held in excess (and those few not greatly in excess) of the spot month limits. Accordingly, the Commission generally is not inclined to change its long-held policy views regarding physical-

[300] *Compare* 7 U.S.C. 6a(c)(2)(A)(iii) and 17 CFR 1.3(z)(1). Note that § 1.3(z)(1)(ii) uses the phrase ''liabilities which a person owes or anticipate incurring,'' while section 4a(c)(2)(A)(iii)(II) uses the phrase ''liabilities that a person owns or anticipates incurring.'' (Emphasis added.) The Commission interprets the word ''owns'' to be an error and the word ''owes'' to be correct.

[301] The Commission interprets the statutory provision that requires that ''the transaction would qualify as a bona fide hedging transaction'' to mean the swap position at the time of the transaction would qualify as a bona fide hedging position. 7 U.S.C. 6a(c)(2)(B)(i).

[302] This is consistent with netting permitted in vacated § 151.4(b) of swaps with futures for purposes of single-month and all-months-combined limits. The Commission noted in that final rulemaking that it did ''not believe that including a risk management provision is necessary or appropriate given that the elimination of the class limits outside of the spot-month will allow entities, including swap dealers, to net Referenced Contracts whether futures or economically equivalent swaps.'' 76 FR at 71644.

[303] 42 FR 42748, Aug. 24, 1977.

[304] *Id.* 42749.

[305] *Compare* 76 FR at 71690. Vacated § 151.5(a)(2)(3) recognized a pass-through swap offset during the spot period as an exception to the five-day rule if the ''pass-through swap position continues to offset the cash market commodity price risk of the bona fide hedging counterparty.'' Based on a review of open positions in physical-delivery futures contracts, the Commission no longer believes it necessary to recognize offsets of swaps in the last few days of the expiring physical-delivery contract and has not provided this additional provision in the current proposal. Rather, the Commission has decided to forego this exception to the five-day rule in the interest of ensuring that the price discovery function of the underlying market is not disrupted during the last few days of the spot period. Further, the Commission believes it would have been administratively burdensome for a trader to demonstrate that its counterparty continued to have a bona fide hedging need through the spot period.

[306] The Commission also relies upon the congressional shift evidenced in the Dodd-Frank Act amendments to the CEA, that directed the Commission, to the maximum extent practicable, in its discretion, (i) to diminish, eliminate, or prevent excessive speculation, (ii) to deter and prevent market manipulation, squeezes, and corners, (iii) to ensure sufficient market liquidity for bona fide hedgers, and (iv) to ensure that the price discovery function of the underlying market is not disrupted. 7 U.S.C. 6a(a)(3)(B). The five-day rule would serve to prevent excessive speculation as a physical-delivery contract nears expiration, thereby deterring or preventing types of market manipulations such as squeezes and corners and protecting the price discovery function of the market. The restriction of the five-day rule does not appear to deprive the market of sufficient liquidity for bona fide hedgers.

delivery futures contracts at this time.[307]

The Commission typically does not publish ''general statistical information'' [308] regarding large trader positions in the expiring physical-delivery energy futures contracts because of concerns that such data may reveal information about the amount of market power a person may need to ''mark the close'' [309] or otherwise manipulate the price of an expiring contract.[310]

f. Trade Option Exemption

The Commission previously amended part 32 of its regulations to allow commodity options to trade subject to the same rules applicable to any other swap, unless the commodity option qualifies under the new § 32.3 trade option exemption.[311] In order to qualify for the trade option exemption, (i) both offeror and offeree must be a producer, processor, or commercial user of, or merchant handling the commodity that is the subject of the commodity option transaction, or the products or byproducts thereof, and both offeror and offeree must be offering or entering into the commodity option transaction solely for purposes related to their business as such,[312] and (ii) the option is intended to be physically settled such that, if exercised, the commodity option would result in the sale of an exempt or agricultural commodity for immediate or deferred shipment or delivery.[313] Qualifying trade options are exempt from all requirements of the CEA and Commission's regulations, except for certain enumerated provisions, including position limits.[314]

The Commission is making conforming changes to the trade option exemption requirement that position limits still apply. Under § 32.3(c)(2), ''Part 151 (Position Limits)'' of the Commission's regulations applies to every counterparty to a trade option ''to the same extent that [part 151] would apply to such person in connection with any other swap.'' The Commission is replacing the reference to ''Part 151,'' now vacated, with ''Part 150'' to clarify that the position limit requirements proposed herein still would be applicable to trade options qualifying under the exemption.

The Commission also is requesting comment as to whether the Commission should use its exemptive authority under CEA section 4a(a)(7) [315] to provide that the offeree of a commodity option qualifying for the trade option exemption would be presumed to be a ''pass-through swap counterparty'' for purposes of the offeror of the trade option qualifying for the pass-through swap offset.[316] Although the Commission is proposing generally to net futures and swaps in reference contracts in the same commodity under proposed § 150.2, as discussed below, the Commission notes that cross-commodity offsets of pass-through swaps would not be recognized unless the counterparty to the swap is a bona fide hedger. Would this presumption help offerors determine the appropriateness of carrying out cross-commodity hedge transactions?

In addition, the Commission requests comments on whether adopting such a presumption might allow use of the exemption to evade Commission rules pertaining to swap transactions. Should the Commission adopt an anti-evasion provision to address this concern? Furthermore, might some additional safeguards be included to allow the Commission to provide administrative simplicity through use of the presumption, while also limiting use of the presumption to evade other regulations?

Further, the Commission requests comment on whether it would be appropriate to exclude trade options from the definition of referenced contracts and, thus, to exempt trade options from the proposed position limits. If trade options were excluded from the definition of reference contracts, then commodity derivative contracts that offset the risk of trade options would not automatically be netted with such trade options for purposes of non-spot month position limits. The Commission notes that forward contracts are not subject to the proposed position limits; however, certain forward contracts may serve as the basis of a bona fide hedging position exemption, *e.g.,* an enumerated bona fide hedging position exemption is available for the offset of the risk of a fixed price forward contract with a short futures position. Should the Commission include trade options as one of the enumerated exemptions (*e.g.,* proposed paragraphs (3)(ii) and (iii) of the definition of bona fide hedging position under proposed § 150.1)? As an alternative to excluding trade options from the definition of referenced contract, should the Commission provide an exemption under CEA section 4a(a)(7) that permits the offeree or offeror to submit a notice filing to exclude their trade options from position limits? If so, why and under what circumstances? Are there any other characteristics of trade options or the parties to trade options that the Commission should consider? Would any of these alternatives permit commodity options that should be regulated as swaps to circumvent the protections established in the Dodd-Frank Act for the forward contract exclusion for non-financial commodities?

g. Enumerated Hedges—Paragraphs (3)–(5).

Proposed paragraph (1)(i) would require a bona fide hedging position in an excluded commodity to be enumerated under paragraphs (3), (4), or (5) of the definition or to be granted an exemption under exchange rules consistent with the risk management guidance of appendix A to part 150. Proposed paragraph (2)(i)(D) would require a bona fide hedging position in

[307] Nevertheless, the Commission requests comment on whether the five-day rule should be waived for pass-through swaps and offsets in the event a position of the bona fide counterparty in the physical-delivery futures contract would have been recognized as a bona fide hedging position. If so, should a person be required to document the continuing bona fides of the counterparty to such swaps through the spot period, that is, in addition to the time of the transaction? Further, should a person also be required to have an unfixed-price forward contract with the bona fide counterparty, so that a person would have a bona fide need and ability to make or take delivery on the physical-delivery futures contract, analogous to the agent provisions in proposed paragraph (3)(iv) of the definition of bona fide hedging position?

[308] As authorized by CEA section 8(a)(1). 7 U.S.C. 12(a)(1).

[309] Marking the close refers to, among other things, the practice of acquiring a substantial position leading up to the closing period of trading in a futures contract, followed by offsetting the position before the end of the close of trading, in an attempt to manipulate prices in the closing period.

[310] The Commission gathers large trader position reports on reportable traders in futures under part 17 of the Commission's rules. That data has historically remained confidential pursuant to CEA section 8. The Commission does, however, publish summary statistics for all-months-combined in its Commitments of Traders Report, available on *http://www.cftc.gov/MarketReports/CommitmentsofTraders/index.htm*.

[311] *See* 17 CFR 32.2; Commodity Options, 77 FR 25320 (Apr. 27, 2012).

[312] Additionally, the offeror can be an eligible contract participant (''ECP'') as defined in CEA section 1a(18).

[313] The Commission noted in the preamble to the trade option exemption that in determining delivery intent, market participants could refer to the guidance provided for the forward contract exclusion in the Product Definition rulemaking. *See* 77 FR at 25326. This guidance conveyed that the Commission's ''Brent Interpretation'' is equally applicable to the forward exclusion from the swap definition as it was to the forward exclusion from the ''future delivery'' definition, which allows for subsequently, separately negotiated book-out transactions to qualify for the forward contract exclusion. *See* 77 FR 48208, 48228, Aug. 13, 2012 (citing Statutory Interpretation Concerning Forward Transactions, 55 FR 39188, Sep. 25, 1990).

[314] *See* 17 CFR 32.3(b)–(d).

[315] 7 U.S.C. 6a(a)(7).

[316] *See* the proposed § 150.1 definition of ''bona fide hedge exemption'' at paragraph (2)(ii).

a physical commodity to be enumerated under paragraphs (3), (4), or (5) of the definition. The Commission has historically enumerated acceptable bona fide hedging positions in § 1.3(z)(2) for physical commodities. Each of the enumerated provisions is discussed below. For convenience, the Commission is providing a summary comparison of the various provisions of the proposed rule, vacated part 151, and current rules, in Table 4 below.

TABLE 4—PROPOSED, CURRENT, AND VACATED ENUMERATED BONA FIDE HEDGES

Cash position underlying bona fide hedging position	Paragraph in proposed definition of bona fide hedging position under § 150.1 and related provisions	Current § 1.3(z) and related provisions	Vacated part 151 definition
Inventory and fixed-price cash commodity purchase contracts.	(3)(i)	1.3(z)(2)(i)(A)	151.5(a)(2)(i)(A).
Fixed-price cash commodity sales contracts.	(3)(ii)	1.3(z)(2)(ii)(A) and (B)	151.5(a)(2)(ii)(A) and (B).
Unfilled anticipated requirements for same cash commodity.	(3)(C)(i)	1.3(z)(2)(ii)(C)	151.5(a)(2)(ii)(C).
Unfilled anticipated requirements for resale by a utility.	(3)(C)(ii)	N/A	N/A.
Hedges by agents	(3)(iv)	1.3(z)(3) Discussed as example of non-enumerated hedge.	151.5(a)(2)(iv).
Unsold anticipated production	(4)(i)	1.3(z)(2)(i)(B)	151.5(a)(2)(i)(B).
Offsetting unfixed-price cash commodity sales and purchases.	(4)(ii) Scope expanded in comparison to part 151.	1.3(z)(2)(iii)	151.5(a)(2)(iii).
Anticipated royalties	(4)(iii) Scope reduced in comparison to part 151 to ownership of royalties.	N/A	151.5(a)(2)(vi).
Services	(4)(iv)	N/A	151.5(a)(2)(vii).
Cross-commodity hedges	(5) Scope expanded to permit cross-hedge of pass-through swap in comparison to part 151.	1.3(z)(2)(iv)	151.5(a)(2)(viii).
Pass-through swap offset	(2)(ii)(A)	1.3(z)(3) and 1.47 Non-enumerated exemption for futures used in risk management of swaps.	151.5(a)(3).
Pass-through swap	(2)(ii)(B)	N/A, as not subject to current federal limits.	151.5(a)(4).
Non-enumerated hedges	150.3(e)	1.3(z)(3) and 1.47	151.5(a)(5).
Filing for anticipatory hedges	150.7	1.3(z) and 1.48	151.5(d).

N/A denotes not applicable.

For clarity, the proposed definition uses the terms long positions and short positions in commodity derivative contracts as those terms are proposed to be defined, rather than the terms purchases or sales of any commodity for future delivery, used in current § 1.3(z)(2). These clarifications are for two reasons. First, the proposed definition only addresses bona fide hedging positions, and does not address bona fide hedging transactions. Although the language of current § 1.3(z)(2) was written to address purchase or sales transactions, the Commission eliminated daily speculative trading volume limits in 1979, as noted above.[317] The Commission and its predecessor has long interpreted the terms sales or purchases of futures contracts in § 1.3(z)(2) to mean short or long positions in futures contracts in the context of position limits.[318] Second, the proposed definition would be applicable to positions in commodity derivative contracts (*i.e.,* futures, options thereon, swaps and direct-access linked FBOT contracts) rather than only to futures and options contracts. As noted above, the Commission preliminarily believes it appropriate to apply the same definition of bona fide hedging positions to all physical commodity derivative contracts subject to federal limits.

The Commission notes that DCMs and SEFs may impose additional conditions on holders of positions in commodity derivative contracts, particularly in the spot month. The Commission has long relied on the DCMs to protect the integrity of the exchange's delivery process in physical-delivery contracts. Congress recognizes this obligation, including in core principle 5, which

[317] 44 FR 7124, Feb. 6, 1979.

[318] The statutory definition of bona fide hedging in section 4a(3) of the Act (prior to the CFTC Act of 1974) used the terms ''sales of any commodity for future delivery . . . to the extent that such sales are offset in quantity by the ownership or purchase of the same cash commodity'' and ''purchases of any commodity for future delivery . . . to the extent that such purchases are offset by sales of the same cash commodity.'' 7 U.S.C. 6a(3) (1940). Following enactment of the CFTC Act, the Secretary of Agriculture's initial proposed definition of bona fide hedging transactions or positions makes clear this understanding, as that definition provided, in relevant part, for ''sales of, or short positions in any commodity for future delivery . . . to the extent that such sales or short positions are offset in quantity by the ownership or fixed-price purchase of the same cash commodity'' and for ''purchases of, or long positions in, any commodity for future delivery . . . to the extent that such purchases or long positions are offset by fixed-price sales of the same cash commodity. . . .'' 39 FR 39731, Nov. 11, 1974. The Commission adopted that same language in its initial definition of bona fide hedging transactions or positions. 40 FR 48688, 48689, Oct. 17, 1975. In both the proposed and final rules in 1977, the Commission was silent as to why it omitted the clarifying phrases ''long positions'' and ''short positions.'' Proposed Rule, 42 FR 14832, Mar. 16, 1977; Final Rule, 42 FR 42748, Aug. 24, 1977.

requires DCMs to consider position limitations or position accountability for speculators to reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month.[319] Exchanges will typically impose on large short position holders in a physical-delivery contract a continuing obligation to compare cash market and futures market prices in the spot month and to liquidate the derivative position (*i.e.,* buy back the short position) if the commodity may be sold at a more favorable (higher) price in the cash market. Further, exchanges will typically impose on large long position holders in a physical-delivery contract a continuing obligation to compare cash market and futures market prices in the spot month and to liquidate the derivative position (*i.e.,* sell the long position) if the commodity may be purchased at a more favorable (lower) price in the cash market. Exchanges can continue these practices under the proposed rule.

(1) Exemption-by-Exemption Discussion

Inventory and cash commodity purchase contracts—paragraph (3)(A). Inventory and fixed-price cash commodity purchase contracts have long served as the basis of a bona fide hedging position.[320] This provision is in current § 1.3(z)(2)(i)(A). A commercial enterprise is exposed to price risk if it has (i) obtained inventory in the normal course of business or (ii) entered into a fixed-price purchase contract, whether spot or forward, calling for delivery in the physical marketing channel of a commodity; and has not offset that price risk. For example, an enterprise may offset such price risk in the cash market by entry into fixed-price sales contracts. An appropriate hedge of inventory or a fixed-price purchase contract would be to establish a short position in a commodity derivative contract to offset the risk of such position. Such short position may be held into the spot month in a physical-delivery contract if economically appropriate.[321]

A person can use a commodity derivative contract to hedge inventories of a cash commodity that is deliverable on that physical-delivery contract. Such a deliverable cash commodity inventory need not be in a delivery location. However, the Commission notes that a DCM or SEF may prudentially require such short positions holders to demonstrate the ability to move the commodity into a deliverable location, particularly during the spot month.[322]

Once inventory has been sold, a person is permitted a commercially reasonable time period, as necessary to exit the market in an orderly manner, to liquidate a position in commodity derivative contracts in excess of a position limit. Generally, the Commission believes such time period would be less than one business day.

Cash commodity sales contracts—paragraph (3)(B). Fixed-price cash commodity sales have long served as the basis of a bona fide hedging position.[323] This provision is in current § 1.3(z)(2)(ii)(A) and (B). A commercial enterprise is exposed to price risk if it has entered into a fixed-price sales contract, whether spot or forward, calling for delivery in the physical marketing channel of a commodity and has not offset that price risk, for example, by entering into a fixed-price purchase contract. An appropriate hedge of a fixed-price sales contract would be to establish a long position in a commodity derivative contract to offset the risk of such cash market contact. Such long position may be held into the spot month in a physical-delivery contract if economically appropriate.

Unfilled anticipated requirements—paragraph (3)(C)(i). Unfilled anticipated requirements for the same cash commodity have long served as the basis of a bona fide hedging position.[324] This provision mirrors the requirement of current § 1.3(z)(2)(ii)(C). An appropriate hedge of unfilled anticipated requirements would be to establish a long position in a commodity derivative contract to offset the risk of such unfilled anticipated requirements.

Under the proposal, such long positions may not be held into the lesser of the last five days of trading or the time period for the spot month in a physical-delivery commodity derivative contract (the five-day rule), with the exception that a person may hold long positions that do not exceed the person's unfilled anticipate requirements of the same cash commodity for the next two months. As noted above, the CME Group and the Working Group pointed out that previously, persons engaged in purchases of futures contracts have been permitted to hold up to twelve months unfilled anticipated requirements of the same cash commodity for processing, manufacturing, or feeding by the same person, provided that such transactions and positions in the five last trading days of any one futures do not exceed the person's unfilled anticipated requirements of the same cash commodity for that month and for the next succeeding month.

Utility hedging unfilled anticipated requirements of customers—paragraph (3)(iii)(B). The Commission is proposing a new exemption for unfilled anticipated requirements for resale by a utility. This provision is analogous to the unfilled anticipated requirements provision of paragraph (3)(iii)(A), except the commodity is not for use by the same person—that is, the utility—but rather for anticipated use by the utility's customers. The proposed new exemption would recognize a bona fide hedging position where a utility is required or encouraged to hedge by its public utility commission (''PUC'').

Request Six of the Working Group petition asked the Commission to grant relief with respect to a long position in a commodity derivative contract that arises from natural gas utilities' desire to hedge the price of gas that they expect to purchase and supply to their retail customers. In support of its petition, the Working Group provided evidence that hedging natural gas price risk, which includes some combination of fixed-price supply contracts, storage and derivatives, is a prudent risk management practice that limits volatility in the prices ultimately paid by consumers.[325]

[319] 7 U.S.C. 7(d)(5).

[320] *See, e.g.,* 7 U.S.C 6a(3) (1970). That statutory definition of bona fide hedging included ''sales of, or short positions in, any commodity for future delivery on or subject to the rules of any contract market made or held by such person to the extent that such sales or short positions are offset in quantity by the ownership or purchase of the same cash commodity by the same person.''

[321] For example, it would not appear to be economically appropriate to hold a short position in the spot month of a commodity derivative contract against fixed-price purchase contracts that provide for deferred delivery in comparison to the delivery period for the spot month commodity derivative contract. This is because the commodity under the cash contract would not be available for delivery on the commodity derivative contract.

[322] Further, the Commission notes an exchange, pursuant to its position accountability rules, may at any time direct a trader that is in excess of accountability levels to reduce a position in a contract traded on that exchange.

[323] *See, e.g.,* 7 U.S.C. 6a(3)(1970). That statutory definition of bona fide hedging included ''purchases of, or long positions in, any commodity for future delivery on or subject to the rules of any contract market made or held by such person to the extent that such purchases or long positions are offset by sales of the same cash commodity by the same person.''

[324] *See, e.g.,* 7 U.S.C. 6a(3)(C) (1970). That statutory definition of bona fide hedging included ''an amount of such commodity the purchase of which for future delivery shall not exceed such person's unfilled anticipated requirements for processing or manufacturing during a specified operating period not in excess of one year: *Provided,* That such purchase is made and liquidated in an orderly manner and in accordance with sound commercial practice in conformity with such regulations as the Secretary of Agriculture may prescribe.''

[325] See, *e.g.,* ''Use of Hedging by Local Gas Distribution Companies: Basic Considerations and

Continued

Materials submitted in support of the Working Group petition [326] make it clear that the risk management transactions—fixed-price contracts, storage, and derivatives—engaged in by a typical natural gas utility to reduce risk associated with anticipated requirements of natural gas are used to fulfill its obligation to serve retail customers and are typically considered by the state PUC as prudent. The PUC may indeed obligate the natural gas utility to hedge some portion of the supply of natural gas needed to meet the needs of its customers and may take regulatory action if the utility fails to do so. As a result, in order to mitigate the impact of natural gas price volatility on the cost of natural gas acquired to serve its regulated retail natural gas customers, a utility may enter into long positions in commodity derivative contracts to hedge a specified percentage of such customers' anticipated natural gas requirements over a multi-year horizon. The utility's PUC considers such hedging practices to be prudent and has allowed gains and losses related to such hedging activities to be retained by its regulated retail natural gas customers.

The Commission recognizes the highly regulated nature of the natural gas market, where state-regulated public utilities may have rules or guidance concerning locking in the costs of anticipated requirements for retail customers through a number of means, including fixed-price purchase contracts, storage, and commodity derivative contracts. Moreover, since the public utility typically does not directly profit from the results of its hedging activity (because most or all of the gains derived from hedging are passed on to customers, *e.g.,* through the price charged for natural gas), the utility has no incentive to speculate.

The Commission invites comments on all aspects of this new enumerated bona fide hedging exemption.

Hedges by agents—paragraph (3)(iv). The Commission is proposing an enumerated exemption for hedges by an agent who does not own or has not contracted to sell or purchase the offsetting cash commodity at a fixed price, provided that the agent is responsible for merchandising the cash positions that are being offset in commodity derivative contracts and the agent has a contractual arrangement with the person who owns the commodity or holds the cash market commitment being offset. The Commission historically has recognized a merchandising transaction as a bona fide hedge in the narrow circumstances of an agent responsible for merchandising a cash market position which is being offset.[327]

Other enumerated hedging positions—paragraph (4). Each of the other enumerated hedging positions would be subject to the five-day rule for physical-delivery contracts. The Commission reiterates the intent of the five-day rule is to protect the integrity of the delivery process in physical-delivery contracts. The reorganization into new paragraph (4) of existing provisions in 1.3(z) subject to the five-day rule is intended for administrative ease.

Unsold anticipated production—paragraph (4)(i). Unsold anticipated production has long served as the basis of a bona fide hedging position.[328] This provision is in current § 1.3(z)(2)(i)(B). The Commission historically has recognized twelve months of unsold anticipated production in an agricultural commodity as the basis of a bona fide hedging position. Under the proposal, this twelve-month restriction would not apply to physical-delivery contracts that were not in an agricultural commodity.

The Commission is considering relaxing the five-day rule to permit a person to hold a position in a physical-delivery commodity derivative contract, other than in an agricultural commodity, through the close of the spot month that does not exceed in quantity the reasonably anticipated unsold forward production that would be available for delivery under the terms of a physical-delivery commodity derivative contract. For example, a person with a significant number of producing natural gas wells may be highly certain that she can be a position to deliver natural gas on the physical-delivery natural gas futures contract.[329] The Commission is considering permitting the exchange listing the physical-delivery commodity derivative contract to administer exemptions to the five-day rule upon application to such exchange specifying the unsold forward production that could be moved into delivery position. The Commission requests comment on this alternative.

Offsetting unfixed-price cash commodity sales and purchases—paragraph (4)(ii). Offsetting unfixed-price cash commodity sales and purchases basis different delivery months in the same commodity derivative contract have long served as the basis of a bona fide hedging position. [330] This provision is in current § 1.3(z)(2)(iii). The Commission explained a major rationale for this exemption for spread positions was to facilitate commercial risk shifting positions which may not have otherwise conformed to the definition of bona fide hedging.[331]

The proposed enumerated provision would be expanded from current § 1.3(z)(2)(iii) to include unfixed-price cash contracts basis different commodity derivative contracts in the same commodity, regardless of whether the commodity derivative contracts are in the same calendar month.[332] The Commission notes a commercial enterprise may enter into the described transactions to reduce the risk arising from either (or both) a location differential or a time differential in unfixed price purchase and sale contracts in the same cash commodity.[333] The contemplated derivative transactions represent a substitute for two transactions to be made at a later time in a physical marketing channel: a fixed-price purchase and a fixed-price sale of the

Regulatory Issues,'' K. Costello and J. Cita, The National Regulatory Research Institute at the Ohio State University (May 2001). All supporting materials provided by the Working Group are available at *http://sirt.cftc.gov/sirt/sirt.aspx?Topic=CommissionOrdersandOtherActionsAD&Key=23082.*

[326] *Id.*

[327] This provision is included in current § 1.3(z)(3) as an example of a potential non-enumerated case. 17 CFR 1.3(z)(3). *Compare* vacated § 151.5(a)(2)(iv).

[328] *See* 7 U.S.C 6a(3)(A) (1940). That statutory definition of bona fide hedging, enacted in 1936, included ''the amount of such commodity such person is raising, or in good faith intends or expects to raise, within the next twelve months, on land (in the United States or its Territories) which such person owns or leases.''

[329] In contrast, prior to harvest, a farmer must plant and manage a crop until it is ripe. Anticipated agricultural production may not be available timely at a delivery location for a futures contract. Thus, historically, only inventories of agricultural commodities, rather than anticipated production, have been recognized as a basis for a bona fide hedging position under the five-day rule.

[330] The Commission added this enumerated exemption to the definition of bona fide hedging in 1987. 52 FR 38914, Oct. 20, 1987.

[331] 51 FR 31648, 31650, September 4, 1986. ''In particular, a cotton merchant may contract to purchase and sell cotton in the cash market in relation to the futures price in different delivery months for cotton, *i.e.,* a basis purchase and a basis sale. Prior to the time when the price is fixed for each leg of such a cash position, the merchant is subject to a variation in the two futures contracts utilized for price basing. This variation can be offset by purchasing the future on which the sales were based [and] selling the future on which [the] purchases were based.'' Id. (n. 3).

[332] The Working Group requested this expansion in Requests One and Two.

[333] A location differential is the difference in price between two derivative contracts in the same commodity (or substantially the same commodity) at two different delivery locations on the same (or similar) delivery dates. A location differential also may underlie a single derivative contract that is called a basis contract.

same cash commodity. The commercial enterprise intends to later take delivery on one unfixed-price cash contract and to re-deliver the same cash commodity on another unfixed-price cash contract. There may be no substantive difference in time between taking and making delivery in the physical marketing channel, but the derivative contracts do not offset each other because they are in two different contracts (*e.g.,* the NYMEX Light Sweet Crude Oil futures contract versus the ICE Europe Brent crude futures) or two different instruments (*e.g.,* swaps versus futures). The contemplated derivative positions will offset the risk that the difference in the expected delivery prices of the two unfixed-price cash contracts in the same commodity will change between the time the hedging transaction is entered and the time of fixing of the prices on the purchase and sales cash contracts. Therefore, the contemplated derivative positions are economically appropriate to the reduction of risk.

In the case of reducing the risk of a location differential, and where each of the underlying transactions in separate derivative contracts may be in the same contract month, the Commission notes that a position in a basis contract would not be subject to position limits, as discussed in the proposed definition of referenced contract.

The Commission notes that upon fixing the price of, or taking delivery on, the purchase contract, the owner of the cash commodity may hold the short derivative leg of the spread as a hedge against a fixed-price purchase or inventory.[334] However, the long derivative leg of the spread would no longer qualify as a bona fide hedging position since the commercial entity has fixed the price or taken delivery on the purchase contract. Similarly, if the commercial entity first fixed the price of the sales contract, the long derivative leg of the spread may be held as a hedge against a fixed-price sale,[335] but the short derivative leg of the spread would no longer qualify as a bona fide hedging position.

Anticipated royalties—paragraph (4)(iii). The new enumerated exemption would permit an owner of a royalty to lock in the price of anticipated mineral production. The Commission initially recognized the hedging of anticipated royalties in vacated § 151.5(a)(2)(vi).[336] That provision would have recognized ''sales or purchases'' in commodity derivative contracts that would be ''offset by the anticipated change in value of royalty rights that are owned by the same person . . . [and] arise out of the production, manufacturing, processing, use, or transportation of the commodity underlying the [commodity derivative contract], which may not exceed one year for agricultural'' commodity derivative contracts; such positions would be subject to the five-day rule.

The Commission has reconsidered that exemption in vacated § 151.5(a)(2)(vi) and now re-proposes it as an enumerated exemption for short positions in commodity derivative contracts offset by the anticipated change in value of mineral royalty rights that are owned by the same person and arise out of the production of a mineral commodity (*e.g.,* oil and gas); such positions would be subject to the five-day rule. This proposed exemption differs from the exemption in vacated § 151.5(a)(2)(vi) because it applies only to: (i) Short positions; (ii) arising from production; and (iii) in the context of mineral extraction.

A royalty arises as ''compensation for the use of property . . . [such as] natural resources, expressed as a percentage of receipts from using the property or as an account per unit produced.'' [337] A short position is the proper offset of a yet-to-be received payment based on a percentage of receipts per unit produced for a royalty that is owned. This is because a short position fixes the price of the anticipated receipts, removing exposure to change in value of the person's share of the production revenue.[338] In contrast, a person who has issued a royalty has, by definition, agreed to make a payment in exchange for value received or to be received (*e.g.,* the right to extract a mineral). Upon extraction of a mineral and sale at the prevailing cash market price, the issuer of a royalty remits part of the proceeds in satisfaction of the royalty agreement. Thus, the issuer of a royalty does not have price risk arising from that royalty agreement.

The Commission preliminarily believes that ''manufacturing, processing, use, or transportation'' of a commodity does not conform to the meaning of the term royalty. Further, while the Commission recognizes that, historically, royalties have been paid for use of land in agricultural production,[339] the Commission has not received any evidence of a need for a bona fide hedging exemption from owners of agricultural production royalties. The Commission nonetheless invites comment on all aspects of this new royalty exemption.

Services—paragraph (4)(iv). The Commission is proposing the hedging of services as a new enumerated hedge in subparagraph (4)(iv) of the proposed definition. This new exemption is not without Commission precedent. For example, in 1977, the Commission noted that the existence of futures markets for both source and product commodities, such as soybeans and soybean oil and meal, afford business firms increased opportunities to hedge the value of services.[340] The Commission's current proposal is similar to vacated § 151.5(a)(2)(vii).[341] That provision would have recognized ''sales or purchases'' in commodity derivative contracts that would be ''offset by the anticipated change in value of receipts or payments due or expected to be due under an executed contract for services held by the same person . . . [and] the contract for services arises out of the production, manufacturing, processing, use, or transportation of the commodity underlying the [commodity derivative contract], which may not exceed one year for agricultural'' commodity derivative contracts; such positions would be subject to the five-day rule. That provision also made such positions subject to a provision for cross-commodity hedging, namely that, ''The fluctuations in the value of the position in [commodity derivative contracts] are substantially related to the fluctuations in value of receipts or payments due or expected to be due under a contract for services.'' [342]

The Commission has reconsidered its proposed exemption in vacated § 151.5(a)(2)(vii) and now re-proposes an enumerated exemption that is largely the same, save for deleting the cross-commodity hedging provision in this enumerated exemption, as that provision is included under the cross-

[334] *See* proposed paragraph (3)(i) of the definition of bona fide hedging position under § 150.1.

[335] *See* proposed paragraph (3)(ii) of the definition of bona fide hedging position under § 150.1.

[336] 76 FR at 71689.

[337] Black's Law Dictionary, 6th Ed.

[338] A short position fixes the price at the entry price to the commodity derivative contract. For any decrease (increase) in price of the commodity produced, the expected royalty would decline (increase) in value, but the commodity derivative contract would increase (decrease) in value, offsetting the price risk in the royalty.

[339] For example, corn ''rents'' were cited in *An Inquiry into the Nature and Causes of the Wealth of Nations,* Smith, Adam, 1776, at cp. 5, *available at: http://www.gutenberg.org/files/3300/3300-h/3300-h.htm.* This eBook is for the use of anyone anywhere at no cost and with almost no restrictions whatsoever. You may copy it, give it away, or re-use it under the terms of the Project Gutenberg License included with this eBook or online at *www.gutenberg.org.*

[340] 42 FR 14832, 14833, Mar. 16, 1977.

[341] 76 FR at 71689.

[342] Vacated § 151.5(a)(2)(vii)(B).

commodity hedging exemption, discussed below. Thus, the proposed exemption would recognize ''sales or purchases'' in commodity derivative contracts that are ''offset by the anticipated change in value of receipts or payments due or expected to be due under an executed contract for services by the same person . . . [and] the contract for services arises out of the production, manufacturing, processing, use, or transportation of the commodity which may not exceed one year for agricultural'' commodity derivative contracts; such positions would be subject to the five-day rule.

As the Commission previously noted and under this proposed exemption, ''crop insurance providers and other agents that provide services in the physical marketing channel could qualify for a bona fide hedge of their contracts for services arising out of the production of the commodity underlying a [commodity derivative contract].'' [343] The Commission invites comment on all aspects of this new services exemption.

(2) Cross-Commodity Hedges—Paragraph (5)

The proposed cross-commodity hedging provision would apply to all enumerated hedges in paragraphs (3) and (4) of the definition of bona fide hedging position, as well as to pass-through swaps under paragraph (2).[344] The Commission has long recognized cross-commodity hedging, noting in 1977 that sales for future delivery of any product or byproduct which is offset by the ownership of fixed-price purchase of the source commodity would be covered by the general provisions for cross-commodity hedging in § 1.3(z)(2).[345]

Under the proposed enumerated exemption, cross-commodity hedging would be conditioned on: (i) The fluctuations in value of the position in the commodity derivative contract (or the commodity underlying the commodity derivative contract) are substantially related to the fluctuations in value of the actual or anticipated cash position or pass-through swap (the ''substantially related'' test); and (ii) the five-day rule being applied to positions in any physical-delivery commodity derivative contract.[346] As discussed above, the five-day rule would not restrict positions in cash-settled contracts, but would restrict only positions in physical-delivery commodity derivative contracts. Thus, the Commission is protecting the integrity of the delivery process in the physical-delivery contract. Further, as noted above, few traders typically hold a position in excess of the position limits during the last few days of the spot month. Hence, a cross-commodity hedger who held a position deep into the spot month in excess of the spot position limit likely would be large relative to all traders. Such large positions may interfere with convergence of the commodity derivative contract with the cash market price, since the supply and demand expectations for cross-commodity hedgers may differ from those of persons hedging price risks of the commodity underlying the physical-delivery derivative.

Substantially related test. The Commission is proposing guidance on the meaning of the substantially related test. The Commission is proposing a non-exclusive safe harbor for cross-commodity hedges.[347] The safe harbor would have two factors: (i) Qualitative; and (ii) quantitative.

Qualitative factor: As a first factor in assessing whether a cross-commodity hedge is bona fide, the target commodity should have a reasonable commercial relationship to the commodity underlying the commodity derivative contract. For example, there is a reasonable commercial relationship between grain sorghum (commonly called milo), used as a food grain for humans or as animal feedstock, with corn underlying a commodity derivative contract.[348]

In contrast, there does not appear to be a reasonable commercial relationship between a physical commodity and a stock price index; while long-term price series of such commodities may be statistically related by either inflation or measures of economic activity, such disparate commodities do not appear to have the requisite commercial relationship. Such correlation appears for this purpose to be spurious.

[343] 76 FR at 71654.

[344] *Compare* with vacated § 151.5(a)(2)(viii), which provided for cross-commodity hedges in enumerated positions but not for pass-through swaps.

[345] 42 FR 14832, 14834, Mar. 16, 1977. The Commission noted its belief that there is little commercial need to maintain cross-hedge positions during the last five trading days of any expiring contract. It believed the five-day restriction was necessary to guarantee the integrity of the markets. The Commission considered there was little commercial utility of such positions during the last five days of trading to offset anticipated production, which at that time was limited to agricultural commodities. The Commission considered its responsibility for orderly markets and concluded not to propose an enumerated exemption in the last five days of trading for anticipatory production. *See also* 7 U.S.C. 6a(3)(B) (1970). That statutory definition of bona fide hedging included ''an amount of such commodity the sale of which for future delivery would be a reasonable hedge against the products or byproducts of such commodity owned or purchased by such person, or the purchase of which for future delivery would be a reasonable hedge against the sale of any product or byproduct of such commodity by such person.'' Id.

[346] *Compare* with current § 1.3(z)(2)(iv), which requires compliance with the substantially related test and with the five-day rule, and does not provide an exception to the five-day rule for cash-settled contracts.

[347] The Commission understands that cross-commodity hedges in physical commodities are not generally recognized by accountants as eligible for hedge accounting treatment.

[348] *See,* e.g., ''The Alternative Field Crops Manual,'' University of Minnesota, November 1989, available at *http://www.hort.purdue.edu/newcrop/afcm/sorghum.html*.

Quantitative factor: The target commodity should also be offset by a position in a commodity derivative contract that provides a reasonable quantitative correlation and in light of available liquid commodity derivative contracts. The Commission will presume an appropriate quantitative relationship exists when the correlation (R), between first differences or returns in daily spot price series for the target commodity and the price series for the commodity underlying the derivative contract (or the price series for the derivative contract used to offset risk), is at least 0.80 for a time period of at least 36 months.[349] When less granular price series than daily are used, R typically will be higher. Thus, price series data of at least daily frequency should be used, if available.

The Commission will presume that positions in a commodity derivative contract that does not meet the safe harbor are not bona fide cross-commodity hedging positions. However, a person may rebut this presumption upon presentation of facts and circumstances demonstrating a reasonable relationship between the spot price series for the commodity to be hedged and either the spot price series for the commodity underlying the commodity derivative contract or the price series for the commodity derivative contract to be used for hedging. A person should consider whether there is an actively traded commodity derivative contract that would meet the safe harbor, in light of liquidity considerations. A person may seek interpretative relief under § 140.99 for recognition of such a position as a bona fide hedging position.

Generally, a regression or time series analysis of prices should be performed to determine an appropriate hedge ratio.[350] Many price series are non-stationary because the prices increase with time and, thus, do not revert to a mean (*i.e.,* stationary) price level. A regression on non-stationary data can give rise to spurious values for the ''goodness of fit'' and other statistics.[351] Thus, a quantitative analysis should be performed using first differences or returns (percentage price changes) so as to render the time series stationary.[352] However, the Commission is not proposing to condition the substantially related test on any particular hedge ratio methodology.

By way of example, the Commission believes that fluctuations in the value of electricity contracts typically will not be substantially related to fluctuations in value of natural gas. There may not be a substantial relation, for example, because the marginal pricing in a spot market may be driven by the price of something other than natural gas, such as nuclear, coal, transmission, outages, or water/hydroelectric power generation. Table 5 below shows illustrative simple correlations, both in terms of levels and returns, between spot electricity prices and natural gas (both spot Henry Hub prices and the nearby NYMEX Henry Hub Natural Gas futures prices, assuming a roll to the next deferred futures contract on the eleventh calendar day of each month). These correlations are much lower than the proposed safe harbor level of 0.80.

[349] By way of comparison, accounting practice may look to goodness of fit (R^2) to be at least 0.80. The proposed correlation (R) of 0.80 corresponds to an R^2 of 0.64, substantially less than accounting practice. Further, accounting practice may look to the coefficient (hedge ratio) from a regression analysis to be in the range of negative 0.80 to 1.25. The Commission notes that the size of this coefficient is dependent upon the unit of trading for the hedging instrument and the unit of trading for the target of the hedge. To the extent both may be expressed in similar terms, the coefficient may fall within the range suggested by accounting practice. However, given standardized hedging instruments such as futures are fixed in terms of a particular price quote for a commodity (such as in dollars per bushel) and the target of a cross-commodity hedge may not have units fixed in the same terms (such as in dollars per hundred weight), the hedge ratio will depend on a fairly arbitrary choice of units to express the price series of the target of the hedge. Thus, the Commission is not proposing any particular safe harbor or requirement for a hedge ratio.

[350] The Commission notes this safe harbor is intentionally written in general terms. Appropriate hedge ratios may be determined using an appropriate model, including but not limited to ordinary lease squares (OLS), autoregressive conditional heteroscedasticity (ARCH), generalized autoregressive conditional heteroscedasticity (GARCH), or an error-correction model (ECM).

[351] ''Goodness of fit'' is defined as: ''A general term describing the extent to which an econometrically estimated equation fits the data. There are various ways of summarizing this concept, including the coefficient of determination and adjusted R^2.'' ''The MIT Dictionary of Modern Economics,'' 4th Ed. (1996).

[352] *See,* e.g., ''A Guide to Econometrics,'' 5th Ed., The MIT Press (2003), at p.319.

TABLE 5—CORRELATIONS—SPOT ELECTRICITY PRICES AND NATURAL GAS (SPOT AND FUTURES) PRICES JANUARY 2, 2009 TO MAY 14, 2013

Price series:	Correlations using:	Henry Hub spot	Henry Hub futures
Houston electricity	Levels	0.1333	0.0630
	Returns	0.1264	0.0488
PJM electricity	Levels	0.4415	0.2724
	Returns	0.0987	0.0153
New England electricity	Levels	0.3450	0.2422
	Returns	0.1808	0.0121

Data sources: Henry Hub Gulf Coast Natural Gas Spot Price ($ per mmBTUs) and Natural Gas Futures Contracts ($ per mmBTU), source: US Energy Information Administration, available at *http://www.eia.gov/dnav/ng/ng_pri_fut_s1_d.htm*; Wholesale Day Ahead Prices at Selected Hubs, Peak (5/16/2013), source: US Energy Information Administration, republished from the Intercontinental Exchange (ICE), available at *http://www.eia.gov/electricity/wholesale/*.

Alternatively, a generator of electricity that owns or leases a natural gas generator may qualify for an unfilled anticipated requirements bona fide hedge to meet a fixed price power commitment (sale of electricity). The position that is hedged is the quantity equivalent of natural gas through the generator to meet the contracted fixed price power commitment.[353] A natural gas hedge exemption can also be applied to operating characteristics of the plant and sources of revenue such as ancillary services.

(3) Examples of Bona Fide Hedging Positions in Appendix B

The Commission is providing examples to illustrate enumerated bona fide hedging positions. The Commission invites comment on all aspects of the examples.

h. Non-Enumerated Hedging Exemptions

The Commission proposes to replace the existing procedures for persons seeking non-enumerated hedging exemptions under current § 1.3(z)(3) and § 1.47 with proposed § 150.3(e), discussed further below, that would provide guidance for persons seeking non-enumerated hedging exemptions through filing of a petition under section 4a(a)(7) of the Act. As noted above, practically all non-enumerated hedging exemption requests were from persons seeking to offset the risk arising from swap books, which the Commission has addressed in the proposed pass-through swaps and pass-through swap offsets, and in the proposal to net positions in futures and swap reference contracts for purposes of single-month and all-months-combined position limits.

The Commission requests comment on industry practices involving the hedging of risks of cash market activities in a physical commodity that are not specifically enumerated in paragraphs (3), (4), and (5) of the proposed definition of bona fide hedging position, the extent to which such hedging practices reflect industry standards or best practices and the particular sources of changes in value that such hedging positions offset.

Under the proposal for hedges of physical commodities, additional enumerated hedges could only be added to the proposed definition of bona fide hedging position by way of notice and comment rulemaking. Should the Commission adopt, as an alternative, an administrative procedure that would allow the Commission to add additional enumerated bona fide hedges without requiring notice and comment rulemaking? If so, what procedures should be used? Is current § 1.47 an appropriate process? And what standards, in addition to the statutory standards of CEA section 4a(c)(2), should be applicable to any such administrative procedure? The Commission is particularly concerned about the absence of standards in current § 1.47. If the Commission were to adopt such an administrative procedure, how should the Commission address the factors in CEA section 4a(a)(3)(B) in such an administrative procedure?

No Proposal of Unfilled Storage Capacity as an Anticipated Merchandizing Hedge. The Commission is not re-proposing a hedge for unfilled storage capacity that was in vacated § 151.5(a)(2)(v). That exemption would have permitted a person to establish as a bona fide hedge offsetting sales and purchases of commodity derivative contracts that did not exceed in quantity the amount of the same cash commodity that was anticipated to be merchandized. That exemption was limited to the current or anticipated amount of unfilled storage capacity that the person owned or leased.

The Commission previously noted it had not recognized anticipated merchandising transactions as bona fide hedges due to its historic view that merchandizing transactions generally fail to meet the economically appropriate test.[354] The Commission explained, ''A merchant may anticipate that it will purchase and sell a certain amount of a commodity, but has not acquired any inventory or entered into fixed-price purchase or sales contracts. Although the merchant may anticipate such activity, the price risk from merchandising activity is yet to be assumed and therefore a transaction in [commodity derivative contracts] could not reduce this yet-to-be-assumed risk.'' In response to comments, the Commission opined that, ''in some circumstances, such as when a market participant owns or leases an asset in the form of storage capacity, the market participant could establish market positions to reduce the risk associated with returns anticipated from owning or leasing that capacity. In these narrow circumstances, the transaction in question may meet the statutory definition of a bona fide hedging transaction.''

With the benefit of further review, the Commission now sees a strong basis to doubt that such a position generally will meet the economically appropriate test. This is because the value fluctuations in a calendar month spread in a commodity derivative contract will likely have at best a low correlation with value fluctuations in expected returns (*e.g.,* rents) on unfilled storage capacity. There are at least two factors that contribute to the size of a calendar month spread.[355] One factor is the cost of carry, comprised of the anticipated storage cost plus the interest paid to finance purchase of the physical

[353] A generator must also be able to satisfy any operating constraints, including minimum production runs.

[354] 76 FR at 71646.

[355] A calendar month spread generally means the purchase of one delivery month of a given futures contract and simultaneous sale of a different delivery month of the same futures contract. *See* CFTC Glossary, available at *http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/index.htm*.

commodity over the time period of the calendar month spread.[356] A second factor, and likely the factor that most contributes to value fluctuations in the calendar month spread, is the difference in the anticipated supply and demand of a commodity on the different dates of the calendar month spread. In this context, a calendar month spread position would likely increase, rather than decrease, risk in the operation of a commercial enterprise. Accordingly, for these reasons, the Commission is not re-proposing to recognize a bona fide hedging position based on an unfilled storage bin and any of a number of commodities that a merchant might store in such bin.

For example, the Commission recognizes there is commercial risk in operating off-farm storage, including the risk that total grain production may not be sufficient to ensure capacity utilization of such storage. Business costs of providing off-farm storage include the fixed cost of the storage facility and the variable costs for labor and fuel, in addition to other costs such as insurance. However, as the Commission noted above, based on its experience, the value fluctuations in a calendar month spread in a commodity derivative contract will likely have at best a low correlation with value fluctuations in expected returns (*e.g.,* rents) on unfilled storage capacity. Therefore, the Commission requests comment on what positions in commodity derivative contracts, if any, would offset the value changes in the commercial risks (e.g., changes in anticipated rental income or changes in other revenue streams) arising from a commodity storage business. And for those positions that would offset value changes in the commercial risks, what data should the Commission obtain to verify such claims? By way of comparison, the Commission has recognized unsold anticipated production and unfilled anticipated requirements for processing, manufacturing or feeding, as the basis of a bona fide hedging position.[357] The Commission has required persons seeking to claim such production or requirements exemptions to file statements showing historical production or usage and anticipated production or usage.[358]

The Commission invites commenters to provide specific, empirical analysis and data that would demonstrate how particular types of transactions could reduce the value at risk of unfilled storage space that could support such an exemption.

i. Summary of Disposition of Working Group Petition Requests

As noted above, the Working Group made ten requests for exemptions under vacated part 151.[359] The Commission summarizes and addresses in a brief statement each request, below.

Request One. Unfixed Price Transactions Involving a Non-Referenced Contract: In a hedge of an unfixed price purchase and unfixed price sale of a physical commodity in which one leg of the hedge is a referenced contract and the other leg is a non-referenced contract, the Working Group requests that the referenced contract leg of the hedge be treated as a bona fide hedging position.

The proposed definition of bona fide hedging position would permit Request One under proposed paragraphs (4)(ii)(B) and (5), discussed above.

Request Two. Offsetting Unfixed Price Transactions Hedged with Derivatives in the Same Calendar Month: The Working Group requests that hedges of an unfixed price purchase and an unfixed price sale of a physical commodity in which the separate legs of the hedge are in the same calendar month, but which do not offset each other, because they are in different contracts or for any other reason, be treated as bona fide hedging positions.

The proposed definition of bona fide hedging position would permit Request Two under proposed paragraphs (4)(ii)(B) and (5), discussed above.

Request Three. Unpriced Physical Purchase or Sale Commitments: The Working Group requests that referenced contracts used to lock in a price differential where one leg of the underlying transaction is an unpriced commitment to buy or sell a physical energy commodity, and the offsetting sale or purchase has not been completed, be treated as bona fide hedging transactions or positions.

This request would not be permitted under the proposed definition of bona fide hedging position. The transaction described in Request Three concerns a commercial entity that has entered into either an unfixed-price sale or an unfixed-price purchase, but has not entered into an offsetting purchase or sale contract. This differs from the proposed enumerated bona fide hedge exemption provided in paragraph (4)(ii) because both sides of the cash transactions have not been contracted.

Locking in the spread for the same commodity between two markets is prudent risk management when a commercial trader has a contractual commitment both to buy and sell the physical commodity at unfixed prices in the same two markets. A commercial merchant may expect to match an unfixed-price purchase with an unfixed-price sale, regardless of which came first, and at that point, will qualify for a hedge exemption for the basis risk, under paragraphs (4)(ii) and (5), as discussed in Requests One and Two, above.

However, a trader has not established a definite exposure to a value change when that trader has established only an unfixed price purchase or sales contract. This cash position fails the change in value requirement. Considering the anticipated merchandizing transaction, a merchant may assert her intention, but merchandizing intentions alone are not sufficient to recognize a price risk (that is, the yet-to-be established pair of unfixed-price cash purchase and sales contracts). The Commission is concerned that exempting such a yet-to-be established cash position would make it difficult or impossible for the Commission to distinguish hedging from speculation. For example, a trader could maintain a derivatives position, exempt from position limits, until that trader enters into a subsequent cash market transaction that results in a book-out of the first unfixed-price cash market transaction. The trader could assert that changed conditions resulted in a change in intentions. Since market prices are continually changing to reflect new information and, thus, changing conditions, the Commission believes an exemption standard based on merchandizing intentions alone would be no standard at all.

The Commission recognizes there can be a gradation of probabilities that an anticipated transaction will occur. However, the example above offers no context in which to evaluate the nature or probability of an anticipated merchandising transaction, and such context is essential to determining the nature of any price risk that has been realized and could support the existence of a bona fide hedge. The Commission notes that in such cases, the only way to evaluate the nature of any price risk would be for the Commission to be provided with particulars of the transaction. This can be done, under the current proposal, either by requesting a staff interpretive letter under § 140.99 or seeking CEA section 4a(a)(7) exemptive

[356] For a brief discussion of cost of carry, *see, e.g.,* ''Options, Futures, and Other Derivatives,'' 3rd Ed., Hull, (1997) at p. 67.

[357] See current § 1.3(z)(2)(i)(B) and (C).

[358] See current § 1.48.

[359] The Working Group Petition is available at *http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/wgbfhpetition012012.pdf.*

relief. Furthermore, in instances where an entity can establish that the nature of their commercial operation is such that they have committed physical or financial resources towards the anticipated transaction, they should consider whether they can avail themselves of the exemption for unsold anticipated production or unfilled anticipated requirements exemptions.

Request Four. Binding, Irrevocable Bids or Offers: The Working Group requests that referenced contracts used to hedge exposure to market price volatility associated with binding and irrevocable fixed-price bids or offers be treated as bona fide hedging positions.

The contemplated transactions are not consistent with the enumerated hedges in proposed paragraphs (3)(i), as a hedge of a purchase contract, or (3)(ii), as a hedge of a sales contract, because the cash transaction is tentative and, therefore, neither a sale nor a purchase agreement.

In the Commission's view, a binding bid or offer by itself is too tenuous to serve as the basis for an exemption from speculative position limits, since it is an uncompleted merchandising transaction that, historically, has not been recognized as the basis for a bona fide hedging transaction under § 1.3(z)(2). Any related derivative would cover a conditional price risk for a bid or offer that would depend on that bid or offer being accepted and, therefore, would not be economically appropriate to the reduction of risk. The commercial entity submitting a binding, fixed-price bid or offer is essentially subject to a contingent price risk.[360] The Commission also understands that some commercial entities submit bids or offers merely to obtain information about the request for proposal, without an intention of submitting a quote that is likely to be accepted.

Moreover, the Working Group's suggestion that the Commission condition its relief on a good-faith showing and immediate reclassification of the portion of the position not awarded against the bid or offer does not protect the market against the prospect that multiple participants may hold such a good-faith belief and may also hold a position in the same direction as the cover transaction. If the Commission were to grant relief with respect to such positions, then all persons who made good-faith bids or offers on a particular cash market solicitation would be eligible to enter into derivatives to cover their potential exposure, in addition to holding speculative positions on the same side of the market at the limit. Under such relief, such persons, in the aggregate, could hold derivatives as cover in an amount several times larger than the total amount to be awarded under the solicitation. Undue volatility could result when the winning bid is accepted and all the losing bidders simultaneously reduce their total positions to get below the speculative position limit level.

In contrast, under the Commission's proposed rules a commercial entity may cover the risk of a yet to be accepted bid or offer, provided its total position does not exceed the Commission's speculative position limits. Thus, when such person's bid or offer is not accepted and that person's speculative position is appropriately limited, that person need not liquidate any of its position to come into compliance with limits. As discussed further below, the Commission proposes to set speculative limits at relatively high levels. Thus, a commercial entity is not likely to be constrained in covering bids or offers unless it also has a relatively large speculative position on the same side of the market.

Request Five. Timing of Hedging Physical Transactions: The Working Group requests that referenced contracts used to hedge a physical transaction that is subject to ongoing, good-faith negotiations, and that the hedging party reasonably expects to conclude, be treated as bona fide hedging transactions or positions.

As with Request Four, the contemplated transactions are not consistent with the enumerated hedges in proposed paragraphs (3)(i), as a hedge of a purchase contract, or (3)(ii), as a hedge of a sales contract, because the cash transaction is tentative (here, subject to negotiation) and, therefore, neither a sale nor a purchase agreement.

The Commission is concerned that a trader has not established a definite exposure to a value change when that trader has only entered into negotiations for a fixed-price purchase or sales contract. This tentative cash position thus fails the change in value requirement.

Further, a trader could assert that changed conditions resulted in a change in intentions and a failure to complete negotiations. Since market prices are continually changing to reflect new information and, thus, changing conditions, the Commission believes an exemption standard based on merchandizing intentions alone (even if the merchant were engaged in good faith negotiations) would be no standard at all.

In the case where the anticipated merchandizing transaction is ''naked,'' or not backed by any existing physical exposure, the Commission is not aware of a methodology for distinguishing naked merchandizing from speculation. In the case of a firm bid or offer not offset by existing physical exposure, an entity can, at the time the bid or offer is accepted, enter into a corresponding hedge transaction or, in the alternative, an entity can enter into a corresponding hedge transaction at the time the bid or offer is made provided the entity remains within the speculative position limits. The Commission invites comment on why hedging in this manner is insufficient to offset physical risks. The Commission asks that parties submitting comments detail the nature of their merchandizing operations and how they realize and account for physical risks related to anticipatory merchandizing transactions not offset by anticipated production or processing requirements. In particular, the Commission requests comment on appropriate measures to address the risks for contingent bids or offers. Under what circumstances should the Commission recognize contingent bids or offers as the basis of a bona fide hedging position? If the Commission were to do so, should only the expected value of the risk of such position be recognized? And what would be an appropriate methodology for distinguishing naked merchandizing from speculation? How should the Commission address the varying ex ante subjective probability of completion of such bids or offers? For example, is an ex post measure of completion, *e.g.,* the ratio of completed transactions to bids or offers, an acceptable proxy to impute the probability of acceptance for purposes of determining an ex ante hedge ratio, regardless of the expected probability of completion on a particular bid or offer? Should the Commission require a person, seeking to claim an exemption based on contingent bids or offers, keep complete records of all such cash market bids or offers? If so, what record format and specific data elements should be kept?

Request Six. Local Natural Gas Utility Hedging of Customer Requirements: The Working Group requests that long positions in referenced contracts purchased by a state-regulated public

[360] For example, if the entity submits a fixed-price bid, it runs the risk that either (a) it did not enter into a derivative hedge position that would cover an accepted bid, and before its bid was accepted, the cash market price decreased (so that it ends up paying an above-market price); or (b) it did enter into a derivatives position (a short position) that would cover an accepted bid, and before its bid was rejected, the derivative price increased so that the entity loses money when it lifts the short position. Either outcome would create a loss for the commercial entity.

utility to hedge the anticipated natural gas requirements of its retail customers be treated as bona fide hedging transactions or positions.

The proposed definition of bona fide hedging position would permit Request Six under proposed paragraph (3)(iii)(B), discussed above.

Request Seven. Use of Physical-Delivery Referenced Contracts to Hedge Physical Transactions Using Calendar Month Average Pricing: The Working Group argues that referenced contracts used to hedge in connection with calendar month average (''CMA'') pricing are not speculative in nature and should be exempt from speculative position limits. The Working Group requests that firms engaged in CMA-priced transactions involving physical-delivery referenced contracts be permitted to hold those positions through the spot month as bona fide hedging positions.

The discussion below summarizes and addresses the petitioner's scenarios under Request Seven and notes the proposed exemptions that would be applicable or the reasons for denial.

Summary of Scenario 1: Refinery hedging unfilled anticipatory requirements for crude oil on a calendar month average basis and cross-hedging the sale of anticipated processed distillate products [361]

The Working Group noted that a refinery may buy crude oil on a CMA basis. The petitioner describes a three-step program whereby a refinery might buy crude oil on a CMA basis and subsequently sell distillate products on a CMA basis. First, on each trading day over approximately a one month period prior to expiration of the nearby NYMEX light sweet crude oil (WTI) futures contract, the refinery purchases futures contracts in the nearby contract month and sells an equivalent amount of futures in the next two deferred contract months in that same futures contract. The resulting positions are calendar month spreads in WTI futures contracts that are acquired at an average price over the one-month period. Second, following the establishment of the spread positions in WTI futures contracts, the refinery engages in exchange of futures for physical commodity (EFP) transactions, obtaining a short nearby WTI futures position in exchange for entering into cash market contracts for purchase of crude oil at a fixed price over the following calendar month.[362] These nearby short WTI futures positions offset the nearby long WTI futures positions of the calendar month spread. Alternatively, the refinery stands for delivery on the nearby long WTI futures positions. As a result, the refinery holds only short deferred month WTI futures positions. Third, as the refinery takes deliveries of crude oil over the following calendar month on the cash market contracts (or alternatively under the physical delivery provisions of the futures contracts), the refinery processes the crude oil then sells the distillate products on the spot market. As the sales of distillate products occur, the refinery buys back the short WTI futures positions in the next two contract months.

The contemplated long positions are consistent with proposed paragraph (3)(iii) to the extent a refinery does not establish a long position in excess of that refinery's unfilled anticipated requirements for crude oil for the next two months. Further, in the case of a refinery, the Commission notes that, unless the refinery has fixed price sales [363] or offsetting short positions of the expected processed cash products, such contemplated long positions in WTI futures alone may not be economically appropriate to the reduction of risk in the conduct and management of a commercial enterprise; hence, the Commission also views the short positions in WTI futures to be an integral component of the contemplated calendar spreads.

Regarding the short positions, the Commission considers the economic consequences of the positions over two time periods: (1) the period of time the refinery holds a calendar spread position (long nearby and short deferred WTI contract months); and (2) the subsequent period of time when the refinery holds only a short position in WTI futures [364] and has a fixed price purchase contract on which it receives crude oil that it processes into distillate products.

Regarding the first time period, when considered as a whole with the long positions covering the unfilled anticipated requirements, the refinery's short positions would be risk reducing transactions, and therefore would qualify under proposed paragraphs (4)(i) and (5), so long as the long futures positions (meeting the unfilled anticipated requirements of paragraph (3)(iii)) fix the input price and the short futures positions fix a significant portion of the price of the expected output of petroleum distillate products that are not yet sold at a fixed price. The refinery's short position in referenced contracts would be an economically appropriate cross-commodity hedge, as contemplated by paragraph (5), to the extent the fluctuations in value of the anticipated processed cash commodities (that is, the petroleum distillates) are substantially related to fluctuations in value of the referenced contracts in crude oil.[365]

During the second time period, the refinery, for example, contracts for the purchase of crude oil at a fixed price (as a result of the EFP transaction) or subsequently holds crude oil in inventory (*e.g.,* through taking delivery on the WTI futures contracts). Thus, the refinery in the second time period initially holds a bona fide hedging position under paragraph (3)(A). Once the crude oil is processed, the refinery also may continue to hold short crude oil futures contracts as a cross-hedge of distillate products under paragraph (5). Proposed paragraph (5) permits a cross-commodity hedge when the fluctuations in value of the position in the commodity derivative contract are substantially related to the fluctuations in value of the actual or anticipated cash

[361] The petitioner separately requested relief for a seller of crude oil on a CMA basis that had contracted to deliver crude oil ratably to a refiner during a month at the daily average spot price. That is, the seller entered into an unfixed price forward sales contract to the refiner. Such a transaction would be covered by the existing bona fide hedging rules. Such an unfixed price sales contract would become partially fixed as each day in the month locked in the daily spot price that would be used to fix the price of deliveries in the forward delivery period. Thus, to the extent the price of the forward contract was partially fixed, a seller could use long positions in commodity derivative contracts to offset the risk of the partially-fixed-price sales contract under the provisions of proposed paragraph (3)(i).

[362] Under NYMEX rules regarding EFP transactions in WTI futures, the buyer and seller of futures must be the seller and buyer of an approximately equivalent quantity of the physical product underlying the futures. *See* NYMEX rule 200.20 (*available at http://www.cmegroup.com/rulebook/NYMEX/2/200.pdf),* and NYMEX rule 538 (*available at http://www.cmegroup.com/rulebook/NYMEX/1/5.pdf).*

[363] A refinery with fixed price sales contracts may, as appropriate, enter into a long position in commodity derivative contracts as a bona fide hedging position or cross-commodity hedging position under proposed paragraphs (3)(ii) and (5).

[364] The refinery's long position in WTI futures would be liquidated as a result of the EFP transaction that established the fixed price purchase contract.

[365] Regarding the first time period, there is another enumerated bona fide hedging exemption involving offsetting commodity derivative contracts. Offsetting sales and purchases of commodity derivative contracts would be recognized as bona fide hedging positions to reduce the risk of unfixed price purchase and sales contracts of the cash commodity (paragraph (4)(ii)). This provision does not recognize positions as bona fide hedges under the five-day rule (*i.e.,* during the lesser of the last five days of trading or the spot month for physical-delivery commodity derivative contracts). The refinery short positions are not similar to positions established to offset the risk of unfixed price sales and purchases, in that the refinery has not entered into open price purchase and sales contracts.

position. In this example, the aggregate price fluctuations of all of the distillate products of crude oil are substantially related to the price fluctuations of crude oil, with such prices expected to differ by refining costs and an expected processing margin. Thus, the refinery in the second time period holds a short futures position that is a bona fide inventory hedge or a bona fide cross-commodity hedge permitted under existing and proposed rules.

Summary of Scenario 2: Merchant short hedge of CMA price purchase of crude oil from producer, and long position to cover anticipated re-sale of crude oil at CMA.

In its January 20, 2012, petition, the Working Group gives the example of a producer that sells oil at the price at which it was valued (basis WTI futures) on each day it was extracted from the earth. The buyer is an aggregator that pays each producer for crude oil on a CMA basis for the production of the prior month. The aggregator seeks to ensure the CMA selling price for the oil purchased from the producers.

The aggregator sells the nearby WTI futures each trading day over a one month period and buys an equivalent quantity of WTI futures contracts in the subsequent two deferred WTI contract months.

Subsequently, the aggregator intends, in an EFP transaction, to exchange long futures in the nearby contract month, for a sales contract to be delivered ratably over the delivery period of that nearby contract month. (The long futures from the EFP transaction would offset the short WTI futures in the nearby contract month.) The aggregator would sell the long futures contracts each day as oil is delivered ratably during the month. By ratably selling the long futures as the physical barrels are delivered, the aggregator effectively realizes the price of the prompt barrel on that trading day.

Alternatively, in its April 17, 2012 supplement, the Working Group argues that it should be sufficient that an aggregator wants to lock in CMA pricing for a sales commitment by entering into the spread position described above, regardless of the facts relating to the purchase side of the transaction.

Because the aggregator is selling futures daily as the price on the aggregator's contractual purchase commitment is being fixed for each day's production, the aggregator builds a short futures position to offset the crude oil it will eventually purchase from the producer under the CMA cash contract at a price that is partially fixed each day the short position is acquired. Once the aggregator is committed at a fixed price to take delivery of the oil, the aggregator holds a bona fide hedging position under paragraph (3)(A), which continues to be a bona fide hedging position under that rule after the aggregator takes delivery of the oil.

The Commission has not recognized as bona fide hedging a long futures position (as a synthetic sales price for the same commodity), when a person holds either inventory or a fixed-price purchase contract, the price risk of which has been offset using a short futures position. From the scenario and alternative presented, it is not clear that there is a price risk that is being reduced. Rather, the aggregator appears to seek to establish a sales price, without a corresponding uncovered price risk in either inventory or fixed-price sales or fixed-price purchase contracts. Thus, the transactions do not satisfy the requirements of the proposed definition of bona fide hedging position.

In considering the petition, the Commission reviewed its historical policy position with respect to bona fide hedges in light of position information regarding physical-delivery energy futures contracts. The Commission reviewed three years of confidential large trader data in cash-settled and physical-delivery energy contracts.[366] The review covered actual positions held in the physical-delivery energy futures markets during the three-day spot period, among all traders (including those who had received hedge exemptions from their D.C.M). It showed that, historically, there have been relatively few positions held in excess (and those few not greatly in excess) of the spot month limits. Accordingly, the Commission does not propose to grant the Working Group's requests regarding Scenario 2.

Nonetheless, the Commission notes that a person desiring to establish a synthetic sales price may hold a position subject to the spot month limit, but cautions that such person should trade so as not to disrupt the settlement price of the physical-delivery contract.

Working Group Petition Requests Eight, Nine, and Ten

Request Eight. Holding a Hedge Using a Physical-Delivery Contract into the Spot Month; Generally: The Working Group requests that firms that use physical-delivery referenced contracts (in commodities other than metals or agriculture) as bona fide hedging transactions or positions be permitted to hold these hedges into the spot month.

Request Nine. Holding a Cross-Commodity Hedge Using a Physical Delivery Contract into the Spot Month: The Working Group requests that firms that use physical-delivery referenced contracts as a cross-commodity hedge be permitted to hold these hedges into the spot month.

Request Ten. Holding a Cross-Commodity Hedge Using a Physical-Delivery Contract to Meet Unfilled Anticipated Requirements: [367] The Working Group argued that the Commission should ''reinstate'' § 1.3(z)(2)(ii)(C) [368] to permit firms to hold cross-commodity hedges involving physical-delivery referenced contracts into the spot month in order to meet their unfilled anticipated requirements.

The proposed definition of bona fide hedging position would permit Request Eight under proposed paragraphs (3)(C), discussed above, for hedges of unfilled anticipated requirements.[369]

However, the proposed definition does not recognize the other requests as bona fide hedging positions. As discussed above, the Commission continues to believe that, as a physical-delivery commodity derivative contract approaches expiration, it is necessary to protect orderly trading and the integrity of the markets. A person holding a large physical-delivery futures position who

[366] The Commission typically does not publish ''general statistical information'' as authorized by CEA section 8(a)(1) regarding large trader positions in the expiring physical-delivery energy futures contracts because of concerns that such data may reveal information about the amount of market power a person may need to ''mark the close'' or otherwise manipulate the price of an expiring contract. Marking the close refers to, among other things, the practice of acquiring a substantial position leading up to the closing period of trading in a futures contract, followed by offsetting the position before the end of the close of trading, in an attempt to manipulate prices in the closing period. The Commission gathers large trader position reports on reportable traders in futures under part 17 of the Commission's rules. That data generally is confidential pursuant to section 8 of the Act. The Commission does, however, publish summary statistics for all-months-combined in its Commitments of Traders Report, available at *http://www.cftc.gov/MarketReports/CommitmentsofTraders/index.htm.*

[367] Request Ten is similar to Request Eight, which also deals with unfilled anticipated requirements. However, Request Eight deals with requirements for the same commodity, whereas Request Ten involves cross-hedging in a different commodity.

[368] Prior to the court's order vacating part 151, § 1.3(z) was amended to in November 2011 to apply only to excluded (*i.e.,* financial, not physical) commodities. Therefore, by requesting that this particular section of § 1.3(z) be ''reinstated,'' petitioner is asking that it be applied once again to physical delivery (exempt and agricultural) commodities. However, § 1.3(z)(2)(iv) has never permitted a cross-commodity hedge under § 1.3(z)(2)(ii)(C) to be held into the five last trading days.

[369] The CME Petition also requested that the Commission recognize as bona fide hedges positions held into the five last trading days in physical-delivery referenced contracts that reduce the risk of two months unfilled anticipated requirements in the same cash commodity, as provided in § 1.3(z)(2)(ii)(C).

has no intention to make or take delivery may cause an unwarranted price fluctuation by demanding to liquidate such position deep into the delivery period in a physical-delivery agricultural contract or a metal futures contract or during the three-day spot period in a physical-delivery energy futures contract. Further, as noted above, a review of large trader positions in physical-delivery energy futures contracts does not show a current practice of traders holding large positions in the spot period of the physical-delivery energy referenced contracts relative to the exchange spot month limits.

The Commission invites comments on all aspects of the Working Group's petition and the Commission review.

2. Section 150.2—Position limits

i. Current § 150.2

The Commission currently sets and enforces speculative position limits with respect to certain enumerated agricultural products.[370] Current § 150.2 provides in its entirety that ''[n]o person may hold or control positions, separately or in combination, net long or net short, for the purchase or sale of a commodity for future delivery or, on a futures-equivalent basis, options thereon, in excess of [enumerated levels].'' [371] As such, the speculative position limits set forth in current § 150.2 apply only to specific futures contracts traded on specific exchanges and, on a futures-equivalent basis, to specific option contracts thereon.[372] ''Futures-equivalent'' is defined in current § 150.1(f) as ''an option contract,'' and nothing else.[373] Accordingly, current § 150.2 establishes federal position limits only for specifically enumerated futures contracts on ''legacy'' agricultural commodities and options on those futures contracts.

In 2010, the Commission proposed to implement additional speculative position limits for futures and option contracts in certain energy commodities (''2010 Energy Proposal'').[374] In the 2010 Energy Proposal, the Commission included a discussion of past and present position limits for certain agricultural contracts under part 150 stating that current § 150.2 applies only to specific agricultural futures and options contracts:

> [t]he current Federal speculative position limits of regulation 150.2 apply only to specific futures contracts [and] (on a futures-equivalent basis) specific option contracts. Historically, all trading volume in a specific contract tended to migrate to a single [futures] contract on a single exchange. Consequently, speculative position limits that applied to a single [futures] contract and options thereon effectively applied to a single market. The current speculative position limits of regulation 150.2 for certain agricultural contracts follow this approach.[375]

The Commission withdrew the 2010 Energy Proposal when the Dodd-Frank Act became law.[376]

The limited scope and applicability of the speculative position limits in current § 150.2, as well as in the 2010 Energy Proposal, are inconsistent with the congressional shift evidenced in the Dodd-Frank Act amendments to section 4a of the Act, upon which the Commission relies in this release. Amended CEA section 4a(a)(1) authorizes the Commission to extend position limits beyond futures and option contracts to swaps traded on a DCM or SEF and swaps not traded on a DCM or SEF that perform or affect a significant price discovery function with respect to regulated entities (''SPDF swaps'').[377] Further, new CEA section 4a(a)(5) requires that speculative position limits apply to swaps that are ''economically equivalent'' [378] to DCM futures and option contracts for agricultural and exempt commodities under new CEA section 4a(a)(2).[379] Similarly, new CEA section 4a(a)(6) requires the Commission to apply position limits on an aggregate basis to contracts based on the same underlying commodity across: (1) DCMs; (2) with respect to foreign boards of trade (''FBOTs''), contracts that are price-linked to a DCM or SEF contract and made available from within the United States via direct access; and (3) SPDF swaps.[380]

In 2011, the Commission proposed and, after comment, adopted rules to establish an expanded position limits regime pursuant to the mandate contained in the Dodd-Frank Act amendments to CEA section 4a.[381] However, in an Order dated September 28, 2012, the U.S. District Court for the District of Columbia vacated the 2011 Position Limits Rulemaking, with the exception of the revised position limit levels in amended § 150.2.[382] Therefore, part 150 continues to apply, as amended, as if part 151 had not been finally adopted by the Commission.[383]

Vacated part 151 would have established federal position limits and limit formulas for 28 physical commodity futures and option contracts, or ''Core Referenced Futures Contracts,'' and would have applied these limits to all derivatives that are directly or indirectly linked to the price of a Core Referenced Futures Contract (collectively, ''Referenced Contracts'').[384] Therefore, the position limits in vacated part 151 would have applied across different trading venues to economically equivalent Referenced Contracts (as specifically defined in part 151) that are based on the same underlying commodity, a concept known as aggregate limits. Vacated

[370] The ''enumerated'' agricultural products refer to the list of commodities contained in the definition of ''commodity'' in CEA section 1a; 7 U.S.C. 1a. This list of agricultural contracts includes nine currently traded contracts: Corn (and Mini-Corn), Oats, Soybeans (and Mini-Soybeans), Wheat (and Mini-wheat), Soybean Oil, Soybean Meal, Hard Red Spring Wheat, Hard Winter Wheat, and Cotton No. 2. *See* 17 CFR 150.2. The position limits on these agricultural contracts are referred to as ''legacy'' limits because these contracts on agricultural commodities have been subject to federal positions limits for decades.

[371] 17 CFR 150.2. Footnote 1 to § 150.2 adds, ''for purposes of compliance with these limits, positions in the regular sized and mini-sized contracts shall be aggregated.'' *Id.*

[372] *See id.*

[373] *See* 17 CFR 150.1(f).

[374] 75 FR 4142, Jan. 26, 2010.

[375] *Id.* at 4152–54.

[376] 75 FR 50950, Aug. 18, 2010.

[377] 7 U.S.C. 6a(a)(1).

[378] Section 4a(a)(5) of the Act requires the Commission to impose the same limits on ''swaps'' that are ''economically equivalent'' to futures and options contracts. The statute does not define the term. But the Commission construes it, consistent with the policy objectives of the Dodd-Frank amendments, to require the Commission to expeditiously impose limits on physical commodity swaps that are price-linked to futures contracts, or to satisfy other defined equivalence criteria. The Commission accordingly construes the term ''economically equivalent'' to require swaps to satisfy the definition of ''referenced'' contract in proposed § 150.1. It requires that a swap be, among other things, ''directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular core referenced futures contract; or . . . directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location or locations as specified in that particular core referenced futures contract . . .'' Other similarities or differences that exist between futures and swaps are not material to the Commission's interpretation of economic equivalence under 7 U.S.C. 6a(a)(5).

[379] 7 U.S.C. 6a(a)(2), (5).

[380] 7 U.S.C. 6a(a)(6). The Commission refers to this requirement in section 4a(a)(6) of the Act as a requirement for position aggregation.

[381] The Commission instructed market participants to continue to comply with the existing position limit regime contained in part 150 and any applicable DCM position limits or accountability levels until the compliance date for the position limits rules in new part 151. After such date, part 150 would have been revoked and compliance with part 151 would have been required. 76 FR 71632.

[382] *See* 887 F. Supp. 2d 259 (D.D.C. 2012).

[383] The District Court's order vacated the final rule and the interim final rule promulgated in the 2011 Position Limits Rulemaking, with the exception of the rule's amendments to 17 CFR 150.2.

[384] 76 FR at 71629.

§ 151.1 defined ''Referenced Contract'' to mean:

on a futures equivalent basis with respect to a particular Core Referenced Futures Contract, a Core Referenced Futures Contract listed in § 151.2, or a futures contract, options contract, swap or swaption, other than a basis contract or commodity index contract, that is: (1) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular Core Referenced Futures Contract; or (2) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular Core Referenced Futures Contract for delivery at the same location or locations as specified in that particular Core Referenced Futures Contract.[385]

In addition to establishing federal position limits for all Referenced Contracts, vacated part 151 would have, among other things, implemented a new statutory definition of bona fide hedging transactions, revised the standards for position aggregation, and established position visibility reporting requirements.[386]

ii. Proposed § 150.2

Proposed § 150.2 would list spot month, single month, and all-months-combined position limits for 28 core referenced futures contracts. Consistent with section 4a(a)(5) of the Act, proposed § 150.2 would apply such position limits to all referenced contracts (as that term is defined in the proposed amendments to § 150.1) [387] including economically equivalent swaps.[388] Consistent with section 4a(a)(6) of the Act, proposed § 150.2 would apply position limits across all trading venues subject to the Commission's jurisdiction. Proposed § 150.2 would also specify Commission procedures for computing position limits levels.

a. Spot Month Limits

Proposed § 150.2(a) provides that no person may hold or control positions in referenced contracts in the spot month, net long or net short, in excess of the level specified by the Commission for physical-delivery referenced contracts and, specified separately, for cash-settled referenced contracts.[389] Proposed § 150.2(a) requires that a trader's positions in the physical-delivery referenced contract and cash-settled referenced contract are to be calculated separately under the separate spot month position limits fixed by the Commission. Therefore, a trader may hold positions up to the spot month limit in the physical-delivery contracts, as well as positions up to the applicable spot month limit in cash-settled contracts (*i.e.,* cash-settled futures and swaps), but a trader in the spot month may not net across physical-delivery and cash-settled contracts. Absent such a restriction in the spot month, a trader could stand for 100 percent of deliverable supply during the spot month by holding a large long position in the physical-delivery contract along with an offsetting short position in a cash-settled contract, which effectively would corner the market. The Commission will closely monitor the effects of its spot-month position limits.

b. Single-Month and All-Months-Combined Limits

Proposed § 150.2(b) provides that no person may hold or control positions, net long or net short, in referenced contracts in a single-month or in all-months-combined in excess of the levels specified by the Commission. Proposed § 150.2(b) permits traders to net all positions in referenced contracts (regardless of whether such referenced contracts are physical-delivery or cash-settled) when calculating the trader's positions for purposes of the proposed single-month or all-months-combined position limits.[390]

The Commission also proposes to amend § 150.2 by deleting the potentially ambiguous phrase ''separately or in combination.'' The Commission first proposed adding the phrase ''separately or in combination'' to § 150.2 in 1992.[391] While the text of current § 150.2 could be read in context to apply limits to futures or option positions, separately or in combination, the preamble to that rulemaking proposal stated otherwise, indicating the Commission was proposing a ''unified approach'' to limits on futures and options positions combined.[392] When considering at that time whether to extend the existing federal position limits on futures contracts also to option contracts (on a futures equivalent basis), the Commission explained that a unified futures and options level limit was ''more appropriate for several reasons'' than position limits on futures that are separate from position limits on options.[393] Further, the Commission noted in the 1992 preamble that ''proposed Rule 150.2 provides that '[n]o person may hold or control net long or net short positions in excess of the stated limits.'' [394] Although the 1992 preamble stated the limit rule was to apply on a net basis to futures and options combined, the regulatory text could be read to suggest a different approach, *i.e.,* applying to futures or options on both a separate basis and a combined basis. The phrase ''separately or in combination'' was not discussed in any subsequent **Federal Register** notice.[395]

[385] *Id.* at 71685.

[386] *See generally* 76 FR 71626, Nov. 18, 2011.

[387] *See* discussion of proposed § 150.1 above.

[388] Section 4a(a)(5) of the Act requires the Commission to impose the same limits on ''swaps'' that are ''economically equivalent'' to futures and options contracts. The statute does not define the term. But the Commission construes it, consistent with the policy objectives of the Dodd-Frank amendments, to require the Commission to expeditiously impose limits on physical commodity swaps that are price-linked to futures contracts, or to satisfy other defined equivalence criteria. The Commission accordingly construes the term ''economically equivalent'' to require swaps to satisfy the definition of ''referenced'' contract in proposed § 150.1. It requires that a swap be, among other things, ''directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular core referenced futures contract; or . . . directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location or locations as specified in that particular core referenced futures contract. . . .'' Other similarities or differences that exist between futures and swaps are not material to the Commission's interpretation of economic equivalence under 7 U.S.C. 6a(a)(5).

[389] The Commission proposes to adopt an amended definition of spot month in proposed § 150.1 (as discussed above), simplified from the spot-month definitions listed in vacated § 151.3. The term ''spot month'' does not refer to a month of time.

[390] The Commission would allow traders to net positions in physical-delivery and cash-settled contracts outside the spot month because the Commission is less concerned about corners and squeezes outside the spot month. Permitting such netting will significantly reduce the number of traders with positions over the levels of non-spot month limits. The Commission discusses how many traders historically held positions over the levels of non-spot month limits below.

[391] *See* Revision of Federal Speculative Position Limits, Proposed Rules, 57 FR 12766, Apr. 13, 1992.

[392] *Id.* at 12768.

[393] *Id.* at 12769.

[394] *Id.* at 12770.

[395] Indeed, the Commission noted in 1993 when it adopted an interim final rule that ''as proposed, speculative position limits for both futures and options thereon are being combined into a single limit.'' *See* interim final rule at 58 FR 17973, Apr. 7, 1993. The Commission noted it ''proposed to unify speculative position limits for both futures and options thereon, reasoning that, because price movements in the two markets are highly related, the unified system more readily reflects the economic reality of a position in its totality. Moreover, unified speculative limits provide the trader with greater flexibility. Further, traders should find such a unified speculative position limit easier to use and to understand. Finally, as a consequence of the simpler structure, unified speculative position limits would be easier to administer, resulting in more accurate and timely market surveillance.'' *Id.* at 17974.

In discussing comments on the 1992 proposed rule, the Commission noted an objection by a DCM to the proposed unified futures and options limits, preferring the DCM's proposed separate futures and options limits. *Id.* at 17976. The Commission discussed views of other commenters regarding the proposed ''unified limits.'' *Id.* at 17977. The

c. Selection of Initial Commodity Derivative Contracts in Physical Commodities

As discussed above, the Commission interprets the CEA to mandate position limits for futures contracts in physical commodities other than excluded commodities (*i.e.,* position limits are required for futures contracts in agricultural and exempt commodities).

The Commission is proposing a phased approach to implement the statutory mandate. The Commission is proposing in this release to establish speculative position limits on 28 core referenced futures contracts in physical commodities.[396] The Commission anticipates that it will, in subsequent releases, propose to expand the list of core referenced futures contracts in physical commodities. The Commission believes that a phased approach will (i) reduce the potential administrative burden by not immediately imposing position limits on all commodity derivative contracts in physical commodities at once, and (ii) facilitate adoption of monitoring policies, procedures and systems by persons not currently subject to positions limits (such as traders in swaps that are not significant price discovery contracts).

The Commission proposes, initially, to establish position limits on these 28 core referenced futures contracts, and related swap and futures contracts, on the basis that such contracts (i) have high levels of open interest[397] and significant notional value of open interest[398] or (ii) serve as a reference price for a significant number of cash market transactions.[399] Thus, in the first phase, the Commission generally is proposing limits on those contracts that it believes are likely to play a larger role in interstate commerce than that played by other physical commodity derivative contracts.

In selecting the list of 28 core referenced futures contracts in proposed § 150.2(d), the Commission calculated the open interest and notional value of open interest for all futures, futures options, and significant price discovery contracts as of December 31, 2012 in all agricultural and exempt commodities. The Commission identified those commodities with the largest notional value of open interest and open interest for agricultural commodities, energy commodities, and metals commodities. The Commission then selected 16 agricultural commodities, 4 energy commodities, and 5 metals commodities. Once these commodities were selected, the Commission determined the most important futures contract, or contracts, within each commodity, generally by selecting the physical-delivery contracts with the highest levels of open interest, and deemed these as the core referenced futures contracts for which position limits would be established in this release. As such, the Commission proposes in this release to set position limits in 19 core referenced futures contracts for agricultural commodities, 4 core referenced futures contracts for energy commodities, and 5 core referenced futures contracts for metals commodities. The Commission currently sets limits for 9 legacy agricultural contracts under part 150.[400]

In selecting the 16 agricultural commodities, the Commission used oats as its baseline since oats has the lowest notional value of open interest and the lowest open interest among the 9 legacy agricultural contracts. Hence, the Commission selected all agricultural commodities that have notional value of open interest and open interest that exceed that of oats.[401] The Commission has determined to defer consideration of speculative position limits on contracts in other agricultural commodities because the Commission must marshal its resources. The Commission anticipates that it will consider speculative position limits on contracts in other agricultural commodities in a subsequent rulemaking.

Table 6 below provides the notional value of open interest and open interest for agricultural contracts by type of commodity contract reported under the Commission's reporting rules.[402] With respect to the type of commodity, it should be noted, for example, that ''wheat'' refers to the general type of physical commodity, and includes contracts listed on three different DCMs.

Commission concluded that it would adopt the unified limits, noting it ''will combine futures and option limits.'' The preamble also made clear the limits would not apply separately, noting further that ''because such positions would be netted automatically under a unified speculative position limit, the Commission is removing and reserving § 150.3(a)(2) which exempts from Federal speculative position limits positions in option contracts which offset the futures positions.'' *Id.* at 17978–79.

[396] The 28 core referenced futures contracts are: Chicago Board of Trade Corn, Oats, Rough Rice, Soybeans, Soybean Meal, Soybean Oil and Wheat; Chicago Mercantile Exchange Feeder Cattle, Lean Hog, Live Cattle and Class III Milk; Commodity Exchange, Inc., Gold, Silver and Copper; ICE Futures U.S. Cocoa, Coffee C, FCOJ–A, Cotton No. 2, Sugar No. 11 and Sugar No. 16; Kansas City Board of Trade Hard Winter Wheat (on September 6, 2013, CBOT and the Kansas City Board of Trade (''KCBT'') requested that the Commission permit the transfer to CBOT, effective December 9, of all contracts listed on the KCBT, and all associated open interest); Minneapolis Grain Exchange Hard Red Spring Wheat; and New York Mercantile Exchange Palladium, Platinum, Light Sweet Crude Oil, NY Harbor ULSD, RBOB Gasoline and Henry Hub Natural Gas.

[397] Open interest for this purpose is the sum of open contracts, as defined in § 1.3(t), in futures contracts and in futures option contracts converted to a futures-equivalent amount, as defined in § 150.1(f), and open swaps, as defined in § 20.1, on a future equivalent basis, as defined in § 20.1, where such swaps are significant price discovery contracts as determined by the Commission under § 36.3(d).

[398] Notional value of open interest for this purpose is open interest times the unit of trading for the relevant futures contract times the price of that futures contract.

[399] The Commission, in the vacated part 151 Rulemaking, selected for what was also intended as a first phase, the same 28 core referenced futures contracts on the same basis. 76 FR at 71629. As was noted when part 151 was adopted, the 28 core referenced futures contracts were selected on the basis that such contracts: (1) had high levels of open interest and significant notional value; or (2) served as a reference price for a significant number of cash market transactions. *Id.*

[400] 17 CFR 150.2.

[401] While cheese has a notional value of open interest that is higher than oats, it has an open interest that is lower than that of oats (the open interest of the cheese contract was less than 10,000 contracts as of year-end 2012). Furthermore, all futures and options contracts in cheese are on the same DCM (which currently has a single month position limit set at 1,000 contracts) and had no Large Trader Reporting for physical commodity swaps as reported under part 20 during January 2013. The Commission intends to address cheese when it proposes, in subsequent releases, expansions to the list of referenced contracts in physical commodities.

[402] 17 CFR Part 16. Commission staff computed notional values of open interest from data reported under § 16.01. Data reported under § 16.01 includes significant price discovery contracts in compliance with core principle VI for exempt commercial markets, app. B to part 36.

TABLE 6—LARGEST AGRICULTURAL COMMODITIES RANKED BY NOTIONAL VALUE OF OPEN INTEREST IN FUTURES, FUTURES OPTIONS, AND SIGNIFICANT PRICE DISCOVERY CONTRACTS, AS OF DECEMBER 31, 2012

Type and rank within type by notion value of open interest	Commodity	Number of contracts	Notional value of open interest	Open interest
Agricultural:				
1	Soybeans	6	$54.07 billion	765,030
2	Corn	6	$51.54 billion	1,545,135
3	Wheat	10	$41.06 billion	767,006
4	Sugar	5	$39.06 billion	896,082
5	Live Cattle	2	$19.91 billion	394,385
6	Coffee	3	$13.89 billion	211,147
7	Soybean Oil	4	$11.01 billion	344,412
8	Soybean Meal	2	$10.46 billion	253,361
9	Cotton	3	$9.75 billion	234,367
10	Lean Hogs	1	$9.68 billion	280,451
11	Cocoa	1	$5.13 billion	218,224
12	Feeder Cattle	1	$2.64 billion	34,816
13	Milk	3	$1.45 billion	40,690
14	Frozen Orange Juice	1	$609 million	29,652
15	Rice	1	$445 million	14,783
16	Cheese	2	$282 million	8,601
17	Oats	1	$187 million	10,755

For exempt commodity contracts, the Commission proposes to initially select the commodities in the energy and metals markets that have the largest open interest and notional value of interest. For metals, the Commission proposes to initially target the 5 largest commodities in terms of notional value of open interest, as listed in Table 7 below, and selected 1 core referenced futures contract for each of the 5 metals. In selecting these 5 core referenced futures contracts, the Commission would establish federal position limits on ninety-eight percent of the open interest in U.S. metals markets.

The next largest commodity in metals after palladium in terms of notional value is iron ore, which has open interest that is about one-quarter that of palladium.[403] Furthermore, there are less than 50 reportable traders[404] in iron ore, while in the 5 selected metals, each has more than 200 reportable traders. The Commission has determined to defer consideration of speculative position limits on contracts in iron ore and other metal commodities because the Commission must marshal its resources. The Commission anticipates that it will consider speculative position limits on contracts in iron ore and other metal commodities in a subsequent rulemaking.

TABLE 7—LARGEST METALS COMMODITIES BY NOTIONAL VALUE OF OPEN INTEREST IN FUTURES, FUTURES OPTIONS, AND SIGNIFICANT PRICE DISCOVERY CONTRACTS, AS OF DECEMBER 31, 2012

Type and rank within type by notion value of open interest	Commodity	Number of contracts	Notional value of open interest	Open interest
Metals:				
1	Gold	6	$100.41 billion	604,853
2	Silver	5	$27.77 billion	180,576
3	Copper	3	$13.28 billion	146,865
4	Platinum	1	$4.78 billion	61,467
5	Palladium	1	$2.08 billion	32,293

For energy commodities, the Commission similarly proposes to select the 4 largest commodities for this first phase of the expansion of speculative position limits and selected 1 core referenced futures contract in each of these 4 commodities. Each of these commodities has a notional value of open interest in excess of $40 billion.

The fifth largest commodity in energy is electricity, and the Commission has determined to defer consideration of speculative position limits on contracts in electricity and other energy commodities because the Commission must marshal its resources. The Commission anticipates that it will consider speculative position limits on contracts in electricity and other energy commodities in a subsequent rulemaking.

[403] The open interest in iron ore futures, futures options, and significant price discovery contracts as of December 31, 2012, was 8,195 contracts and the notional value of open interest was $236.63 million.

[404] A reportable trader is a trader with a reportable position as defined in § 15.00(p).

TABLE 8—LARGEST ENERGY COMMODITIES BY NOTIONAL VALUE OF OPEN INTEREST IN FUTURES, FUTURES OPTIONS, AND SIGNIFICANT PRICE DISCOVERY CONTRACTS, AS OF DECEMBER 31, 2012

Type and rank within type by notion value of open interest	Commodity	Number of contracts	Notional value of open interest	Open interest
Energy:				
1	Crude Oil	76	$516.42 billion	6,188,201
2	Heating Oil/Diesel	89	$470.69 billion	1,192,036
3	Natural Gas	216	$225.74 billion	21,335,777
4	Gasoline	54	$46.13 billion	402,369

d. Setting Levels of Spot-Month Limits

Proposed § 150.2(e)(1) establishes the initial levels of speculative position limits for each referenced contract at the levels listed in appendix D to this part. These levels would become effective 60 days after publication in the **Federal Register** of a final rule adopted by the Commission. The Commission proposes to set the initial spot month position limit levels for referenced contracts at the existing DCM-set levels for the core referenced futures contracts because the Commission believes this approach is consistent with the regulatory objectives of the Dodd-Frank Act amendments to the CEA and many market participants are already used to these levels.[405]

As an alternative to the initial spot month limits in proposed appendix D to part 150, the Commission is considering setting the initial spot month limits based on estimated deliverable supplies submitted by the CME Group in correspondence dated July 1, 2013.[406] Under this alternative, the Commission would use the exchange's estimated deliverable supplies and apply the 25 percent formula to set the level of the spot month limits in a final rule if the Commission verifies the exchange's estimated deliverable supplies are reasonable. For purposes of setting initial spot month limits in a final rule, in the event the Commission is not able to verify an exchange's estimated deliverable supply for any commodity as reasonable, then the Commission may determine to adopt the initial spot month limits in proposed appendix D for such commodity, or such higher level based on the Commission's estimated deliverable supply for such commodity, but not greater than would result from the exchange's estimated deliverable supply. The Commission requests comment on whether the initial spot month limits should be based on the exchange's July 1, 2013, estimations of deliverable supplies, once verified. The spot month limits that would result from the CME's estimated deliverable supplies are show in Table 9 below.

TABLE 9—ALTERNATIVE PROPOSED INITIAL SPOT MONTH LIMIT LEVELS FOR CERTAIN CORE REFERENCED FUTURES CONTRACTS (BASED ON CME GROUP ESTIMATES OF DELIVERABLE SUPPLY SUBMITTED TO THE COMMISSION ON JULY 1, 2013)

Contract	Current spot-month limit	Alternative proposed spot-month limit (25% of deliverable supply rounded up to the next 100 contracts)	CME Group deliverable supply estimate	CME Group deliverable supply estimate in contracts
Legacy Agricultural				
Chicago Board of Trade Corn (C)	600	1,000	19,590,000 bushels	3,918
Chicago Board of Trade Oats (O)	600	1,500	29,470,000 bushels	5,894
Chicago Board of Trade Soybeans (S)	600	1,200	23,900,000 bushels	4,780
Chicago Board of Trade Soybean Meal (SM)	720	4,400	1,753,047 tons	17,531
Chicago Board of Trade Soybean Oil (SO)	540	5,300	1,253,000 lbs	20,883
Chicago Board of Trade Wheat (W)	600	3,700	73,790,000 bushels	14,757
Kansas City Board of Trade Hard Winter Wheat (KW).	600	4,100	81,710,000 bushels	16,342
Other Agricultural				
Chicago Board of Trade Rough Rice (RR)	600	1,800	14,100,000 cwt	7,050
Chicago Mercantile Exchange Class III Milk (DA).	1500	5,300	4,170,000,000 lbs	20,850
Energy				
New York Mercantile Exchange Henry Hub Natural Gas (NG).	1,000	3,900	154,200,000 mmBtu	15,420

[405] DCMs currently set spot-month position limits based on their own estimates of deliverable supply. Federal spot-month limits can, therefore, be implemented by the Commission relatively expeditiously.

[406] Letter from Terrance A. Duffy, Executive Chairman and President, CME Group, to CFTC Chairman Gensler, Commissioner Chilton, Commissioner Sommers, Commissioner O'Malia, Commissioner Wetjen, and Division of Market Oversight Director Richard Shilts, dated July 1, 2013 (*available at www.cftc.gov).* The Commission notes the CME Group did not propose to set the level of spot month limits using the 25 percent formula in this letter.

TABLE 9—ALTERNATIVE PROPOSED INITIAL SPOT MONTH LIMIT LEVELS FOR CERTAIN CORE REFERENCED FUTURES CONTRACTS (BASED ON CME GROUP ESTIMATES OF DELIVERABLE SUPPLY SUBMITTED TO THE COMMISSION ON JULY 1, 2013)—Continued

Contract	Current spot-month limit	Alternative proposed spot-month limit (25% of deliverable supply rounded up to the next 100 contracts)	CME Group deliverable supply estimate	CME Group deliverable supply estimate in contracts
New York Mercantile Exchange Light Sweet Crude Oil (CL).	3,000	12,100	48,100,000 barrels	48,100
New York Mercantile Exchange NY Harbor ULSD (HO).	1,000	5,500	20,000,000 barrels	22,000
New York Mercantile Exchange RBOB Gasoline (RB).	1,000	7,300	29,000,000 barrels	29,000
Metal				
Commodity Exchange, Inc. Copper (HG)	1,200	1,700	161,850,000 lbs	6,474
Commodity Exchange, Inc. Gold (GC)	3,000	27,300	10,911,100 troy ounces	109,111
Commodity Exchange, Inc. Silver (SI)	1,500	5,700	113,375,000 troy ounces	22,675
New York Mercantile Exchange Palladium (PA).	650	1,500	578,900 troy ounces	5,789
New York Mercantile Exchange Platinum (PL)	500	800	152,150 troy ounces	3,043

The Commission is considering a further alternative to setting the spot month limit at a level based on 25 percent of estimated deliverable supply. This alternative would permit the Commission, in its discretion, both for setting an initial spot month limit and subsequent resets, to use the recommended level, if any, of the spot month limit as submitted by each DCM listing a CRFC (if lower than 25 percent of estimated deliverable supply). Under this alternative, the Commission would have discretion to set the level of any spot month limit to the DCM's recommended level, a level corresponding to 25 percent of estimated deliverable supply, or a level in proposed appendix D. The Commission requests comment on all aspects of this alternative. Specifically, is the Commission's discretion in administering levels of spot month limits appropriately constrained by the choice, in its discretion, of the DCM's recommended level or the level corresponding to 25 percent of deliverable supply or a level in proposed appendix D?

Proposed § 150.2(e)(3) explains how the Commission will calculate spot month position limit levels. The Commission proposes to fix the levels of the spot-month limits for referenced contracts based on one-quarter of the estimated spot-month deliverable supply in the relevant core referenced futures contract, no less frequently than every two calendar years.[407] Under the proposal, each DCM listing a core referenced futures contract would be required to report to the Commission an estimate of spot-month deliverable supply, accompanied by a description of the methodology used to derive the estimate and any statistical data supporting the estimate.[408] Proposed § 150.2(e)(3) provides a cross-reference to appendix C to part 38 for guidance on how to estimate deliverable supply.[409] The Commission proposes to utilize the estimated spot-month deliverable supply provided by a DCM unless the Commission decides to rely on its own estimate of deliverable supply.

The Commission proposes to update spot-month limits every two years for each of the 28 referenced contracts, and to stagger the dates on which DCMs must submit estimates of deliverable supply. The Commission has re-evaluated data on the frequency with which DCMs historically have changed the levels of spot month limits in the 28 physical-delivery core referenced futures contracts. Given the low frequency of changes to DCM spot month limits, the Commission has reconsidered requiring annual updates for referenced contracts in agricultural commodities.[410] When compared with annual updates to the spot month position limits, biennial updates would reduce the burden on market participants in updating speculative position limit monitoring systems.[411]

The term ''estimated deliverable supply'' means the amount of a commodity that can reasonably be expected to be readily available to short traders to make delivery at the

[407] Federal spot month limits have historically been set at one-quarter of estimated deliverable supply. *See, e.g.,* 64 FR 24038, 24041, May 5, 1999. Further, current guidance on complying with DCM core principle 5 calls for spot month levels to be set at ''no greater than one-quarter of the estimated spot month deliverable supply. . . .'' 17 CFR 150.5(c)(1).

[408] The timing for submission of such reports varies by commodity type—*see* proposed § 150.2(e)(ii)(A)–(D).

[409] *See* 17 CFR part 38, appendix C, at section (b)(1)(i).

[410] In any event, core principle 5 in section 5(d)(5) of the Act imposes a continuing obligation on a DCM, where the DCM has set a position limit as necessary and appropriate, to ensure levels of position limits are set to reduce the potential threat of market manipulation or congestion (especially during the spot month). 7 U.S.C. 7(d)(5). Thus, a DCM appropriately would reduce the level of its exchange-set spot month limit if the level of deliverable supply declined significantly. Core principle 6 in section 5h(f)(6) of the Act imposes a similar obligation on a SEF that is a trading facility. 7 U.S.C. 7b–3(f)(6).

[411] Proposed § 150.2(e)(3) also provides the Commission with flexibility to reset spot month position limits more frequently than every two years, but the proposed rule would require DCMs to submit estimated deliverable supplies only every two years. This means, for example, that a DCM may with discretion provide the Commission with updated estimated deliverable supplies and petition the Commission to reset spot month limits more frequently than every two years. Similarly, proposed § 150.2(e)(4) provides the Commission with flexibility to change non-spot month position limits more frequently than every two years. This means, for example, that a DCM may petition the Commission to reset non-spot month position limits based on the most recent calendar-year's open interest.

expiration of a futures contract.[412] The use of estimated deliverable supply to set spot-month limits is wholly consistent with DCM core principles 3 and 5.[413] Currently, in determining whether a physical-delivery contract complies with core principle 3, the Commission considers whether the specified contract terms and conditions may result in an estimated deliverable supply that is sufficient to ensure that the contract is not readily susceptible to price manipulation or distortion. The Commission has previously indicated that it would be an acceptable practice for a DCM to set spot-month limits pursuant to core principle 5 based on an analysis of estimated deliverable supplies.[414] Accordingly, the Commission is adopting estimated deliverable supply as the basis of setting spot-month limits.

The Commission proposes to adopt the 25 percent level of estimated deliverable supply for setting spot-month limits because, based on the Commission's surveillance and enforcement experience, this formula narrowly targets the trading that may be most susceptible to, or likely to facilitate, price disruptions. The Commission believes this spot month limit formula best maximizes the statutory objectives expressed in CEA section 4a(a)(3)(B) of preventing excessive speculation and market manipulation, ensuring market liquidity for bona fide hedgers, and promoting efficient price discovery. This formula is consistent with the longstanding acceptable practices for DCM core principle 5 which provide that, for physical-delivery contracts, the spot-month limit should not exceed 25 percent of the estimated deliverable supply.[415] The Commission believes, based on its experience and expertise, that the formula would be an effective prophylactic tool to reduce the threat of corners and squeezes, and promote convergence without compromising market liquidity.[416]

Furthermore, the Commission has observed generally low usage among all traders of the physical-delivery futures contract during the spot month, relative to the existing exchange spot-month position limits. Thus, the Commission infers that few, if any, traders offset the risk of swaps in physical-delivery futures contracts during the spot month with positions in excess of the exchange's current spot month limits.[417] The Commission invites comments as to the extent to which traders actually have offset the risk of swaps during the spot month in a physical-delivery futures contract with a position in excess of an exchange's spot-month position limit.

Additionally, the Commission imposes spot-month limits using the same formula to restrict the size of positions in cash-settled contracts that would potentially benefit from a trader's distortion of the price of the underlying referenced contract (or other cash price series) that serves as the basis of cash settlement.[418] The Commission has found that traders with positions in look-alike cash-settled contracts have an incentive to manipulate and undermine price discovery in the physical-delivery contract to which the cash-settled contract is linked by price. This practice is known as ''banging'' or ''marking the close,'' [419] a manipulative practice that the Commission prosecutes and that this proposal seeks to prevent.[420]

In the final part 38 rulemaking, the Commission instructed DCMs, when estimating deliverable supplies, to take into consideration the individual characteristics of the underlying commodity's supply and the specific delivery features of the futures contract.[421] In this regard, the Commission notes that DCMs historically have set or maintained exchange spot month limits at levels below 25 percent of deliverable supply. Setting such a lower level of a spot month limit may also serve the objectives of preventing excessive speculation, manipulation, squeezes and corners, while ensuring sufficient market liquidity for bona fide hedgers in the view of the listing DCM and ensuring the price discovery function of the market is not disrupted. Hence, the Commission observes that there may be a range of spot month limits, including limits set at levels below 25 percent of deliverable supply, which may serve as practicable to maximize these policy objectives.

e. Setting Levels of Single-Month and All-Months-Combined Limits

Proposed § 150.2(e)(4) explains how the Commission would calculate non-spot-month position limit levels, which the Commission proposes to fix no less frequently than every two calendar years. In contrast to spot month position limits which are set as a function of estimated deliverable supply, the formula for the non-spot-month position limits is based on total open interest for all referenced contracts in a commodity. The actual position limit level will be set based on a formula: 10 percent of the open interest for the first 25,000 contracts and 2.5 percent of the open interest thereafter.[422] The Commission has used the 10, 2.5 percent formula in administering the level of the legacy all-

[412] As part of its recently published guidance for complying with DCM core principle 3, the Commission provided guidance on how to calculate deliverable supplies in appendix C to part 38 (at paragraph (b)(1)(i)). 77 FR 36612, 36722, Jun. 19, 2012. Typically, deliverable supply reflects the quantity of the commodity that potentially could be made available for sale on a spot basis at current prices at the contract's delivery points. For a physical-delivery commodity contract, this estimate might represent product which is in storage at the delivery point(s) specified in the futures contract or can be moved economically into or through such points consistent with the delivery procedures set forth in the contract and which is available for sale on a spot basis within the marketing channels that normally are tributary to the delivery point(s).

[413] DCM core principle 3 specifies that a board of trade shall list only contracts that are not readily susceptible to manipulation. *See* CEA section 5(d)(3); 7 U.S.C. 7(d)(3). DCM core principle 5 (discussed in detail below) requires a DCM to establish position limits or position accountability provisions where necessary and appropriate ''to reduce the threat of market manipulation or congestion, especially during the delivery month.'' CEA section 5(d)(5); 7 USC 7(d)(5). *See also* guidance and discussion of estimated deliverable supply in Core Principles and Other Requirements for Designated Contract Markets, Final Rule, 77 FR 36612, 36722, Jun. 19, 2012.

[414] *See* 17 CFR 150.5(b).

[415] *Id.*

[416] The Commission also has established requirements for a DCM to monitor a physical-delivery contract's terms and conditions as they relate to the convergence between the futures contract price and the cash price of the underlying commodity. 17 CFR 38.252. See the preamble discussion of § 38.252 in the final part 38 rulemaking. 77 FR 36612, 36635, June 19, 2012. The spot month limits will be set at levels that target only extraordinarily large traders. For example, the spot month limit for CBOT Wheat will be set at 600 contracts. The contract size for CBOT Wheat is 5,000 bushels (~136 metric tons). The current price of a bushel of wheat is approximately $7 per bushel. Therefore, a speculative trader would be permitted to carry a ~$21 million position in wheat into the spot month under the proposed position limits regime.

[417] *See* 76 FR at 71635 (n. 100–01) (discussing data in CME natural gas contract).

[418] The Commission also has established requirements for DCMs to monitor the pricing of cash-settled contracts. 17 CFR 38.253.

[419] Section 4c(a)(5) of the Act lists certain unlawful disruptive trading practices, including ''any trading, practice, or conduct on or subject to the rules of a registered entity that . . . demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period.'' 7 U.S.C. 6c(a)(5)(B). ''Banging'' or ''marking the close'' is discussed in the Commission's Antidisruptive Practices Authority, Interpretive guidance and policy statement, 78 FR 31890, 31894–96, May 28, 2013.

[420] *See, e.g., DiPlacido* v. *CFTC,* 364 Fed. Appx. 657 (2d Cir. 2009) (upholding Commission finding that DiPlacido manipulated the market where DiPlacido's closing trades accounted for 14% of the market).

[421] *See* 77 FR 36611, 36723, Jun. 12, 2012. DCM estimates of deliverable supplies (and the supporting data and analysis) will continue to be subject to Commission review.

[422] The Commission proposes to use the futures position limits formula (the 10, 2.5 percent formula) to determine non-spot-month position limits for referenced contracts. The 10, 2.5 percent formula is identified in 17 CFR 150.5(c)(2).

months position limits since 1999.[423] The Commission believes the non-spot month position limits would restrict the market power of a speculator that could otherwise be used to cause unwarranted price movements. The Commission solicits comment on its single-month and all-months-combined limits, including whether the proposed formula has effectively addressed and will continue to address the § 4a(a)(3) regulatory objectives.

The Commission also proposes to estimate average open interest in referenced contracts based on the largest annual average open interest computed for each of the past two calendar years, using either month-end open contracts or open contracts for each business day in the time period, as the Commission finds in its discretion to be reliable.

(1) Initial Levels

For setting the levels of initial non-spot month limits, the Commission proposes to use open interest for calendar years 2011 and 2012 in futures contracts, options thereon, and in swaps that are significant price discovery contracts that are traded on exempt commercial markets.

TABLE 10—OPEN INTEREST AND CALCULATED LIMITS BY CORE FUTURES REFERENCED CONTRACT, JANUARY 1, 2011, TO DECEMBER 31, 2012

Legacy Agricultural	CBOT Corn (C)	2011	2,063,231	1,987,152	53,500	51,600	53,500
		2012	1,773,525	1,726,096	46,300	45,100	
	CBOT Oats (O)	2011	15,375	15,149	1,600	1,600	1,600
		2012	12,291	11,982	1,300	1,200	
	CBOT Soybeans (S)	2011	822,046	798,417	22,500	21,900	26,900
		2012	997,736	973,672	26,900	26,300	
	CBOT Soybean Meal (SM)	2011	237,753	235,945	7,900	7,800	9,000
		2012	283,304	281,480	9,000	9,000	
	CBOT Soybean Oil (SO)	2011	392,658	382,100	11,700	11,500	11,900
		2012	397,549	388,417	11,900	11,600	
	CBOT Wheat (W)	2011	565,459	550,251	16,100	15,700	16,200
		2012	572,068	565,490	16,200	16,100	
	ICE Cotton No. 2 (CT)	2011	275,799	272,613	8,800	8,700	8,800
		2012	259,608	261,789	8,400	8,500	
	KCBT Hard Winter Wheat (KW).	2011	183,400	177,998	6,500	6,400	6,500
		2012	155,540	155,074	5,800	5,800	
	MGEX Hard Red Spring Wheat (MWE).	2011	55,938	54,546	3,300	3,300	3,300
		2012	40,577	40,314	2,900	2,900	
Other Agricultural	CBOT Rough Rice (RR)	2011	21,788	21,606	2,200	2,200	2,200
		2012	15,262	14,964	1,600	1,500	
	CME Milk Class III (DA)	2011	55,567	57,490	3,300	3,400	3,400
		2012	47,378	47,064	3,100	3,100	
	CME Feeder Cattle (FC)	2011	44,611	43,730	3,000	3,000	3,000
		2012	44,984	43,651	3,000	3,000	
	CME Lean Hog (LH)	2011	284,211	288,281	9,000	9,100	9,400
		2012	296,822	297,882	9,300	9,400	
	CME Live Cattle (LC)	2011	433,581	440,229	12,800	12,900	12,900
		2012	409,501	417,037	12,200	12,400	
	ICUS Cocoa (CC)	2011	191,801	198,290	6,700	6,900	7,100
		2012	202,886	206,808	7,000	7,100	
	ICE Coffee C (KC)	2011	174,845	176,079	6,300	6,300	7,100
		2012	204,268	207,403	7,000	7,100	
.							
	ICE FCOJ–A (OJ)	2011	37,347	36,813	2,900	2,800	2,900
		2012	30,788	29,867	2,700	2,700	
	ICE Sugar No. 11 (SB)	2011	814,234	806,887	22,300	22,100	23,500
		2012	855,375	862,446	23,300	23,500	
	ICE Sugar No. 16 (SF)	2011	11,532	11,662	1,200	1,200	1,200
		2012	10,485	10,530	1,100	1,100	
Energy	NYMEX Henry Hub Natural Gas (NG).	2011	4,831,973	4,821,859	122,700	122,500	149,600
		2012	5,905,137	5,866,365	149,600	148,600	
	NYMEX Light Sweet Crude Oil (CL).	2011	4,214,770	4,291,662	107,300	109,200	109,200
		2012	3,720,590	3,804,287	94,900	97,000	
	NYMEX NY Harbor ULSD (HO).	2011	559,280	566,600	15,900	16,100	16,100
		2012	473,004	485,468	13,800	14,100	

[423] *See* 64 FR 24038, 24039, May 5, 1999. The Commission applies the open interest criterion by using a formula that specifies appropriate increases to the limit level as a percentage of open interest. As the total open interest of a futures market increases, speculative position limit levels can be raised. The Commission proposed using the 10, 2.5 percent formula in 1992. *See* Revision of Federal Speculative Position Limits, Proposed Rules, 57 FR 12766, 12770, Apr. 13, 1992. The Commission implemented the 10, 2.5 percent formula in two steps, the first step in 1993 and the second step in 1999. *See* Revision of Federal Speculative Limits, Interim Final Rules, 58 FR 17973, 17978, Apr. 7, 1993. *See also* Establishment of Speculative Position Limits, 46 FR 50938, Oct. 16, 1981 (''[T]he prevention of large or abrupt price movements which are attributable to the extraordinarily large speculative positions is a congressionally endorsed regulatory objective of the Commission. Further, it is the Commission's view that this objective is enhanced by the speculative position limits since it appears that the capacity of any contract to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of such positions, i.e., the capacity of the market is not unlimited.'').

TABLE 10—OPEN INTEREST AND CALCULATED LIMITS BY CORE FUTURES REFERENCED CONTRACT, JANUARY 1, 2011, TO DECEMBER 31, 2012—Continued

	NYMEX RBOB Gasoline (RB).	2011	362,349	370,207	11,000	11,200	11,800
		2012	388,479	393,219	11,600	11,800	
Metals	COMEX Copper (HG)	2011	134,097	131,688	5,300	5,200	5,600
		2012	148,767	147,187	5,600	5,600	
	COMEX Gold (GC)	2011	782,793	746,904	21,500	20,600	21,500
		2012	685,618	668,751	19,100	18,600	
	COMEX Silver (SI)	2011	179,393	172,567	6,400	6,200	6,400
		2012	165,670	164,064	6,100	6,000	
	NYMEX Palladium (PA)	2011	22,327	22,244	2,300	2,300	5,000
		2012	23,869	24,265	2,400	2,500	
	NYMEX Platinum (PL)	2011	40,988	40,750	2,900	2,900	5,000
		2012	54,838	54,849	3,300	3,300	

Given the levels of open interest for the calendar years of 2011 and 2012 for futures contracts and for swaps that are significant price discovery contracts traded on exempt commercial markets, this formula would result in levels for non-spot month position limits that are high in comparison to the size of positions typically held in futures contracts.[424] Few persons held positions over the levels of the proposed position limits in the past two calendar years, as illustrated in Table 11 below. To provide the public with additional information regarding the number of large position holders in the past two calendar years, the table also provides counts of persons over 60, 80, 100, and 500 percent of the levels of the proposed position limits. Note that the 500 percent line is omitted from Table 11 where no person held a position over that level.

TABLE 11—UNIQUE PERSONS OVER PERCENTAGES OF PROPOSED POSITION LIMIT LEVELS, JANUARY 1, 2011, TO DECEMBER 31, 2012

Commodity type/core referenced futures contract	Percent of level	Unique persons over level			
		Spot month (physical-delivery)	Spot month (cash-settled)	Single month	All months
Legacy Agricultural					
CBOT Corn (C)	60	243	4	9	16
	80	167	*	6	8
	100	53	*	*	5
	500	7			
CBOT Oats (O)	60	5		15	15
	80	4		8	9
	100	*		6	8
CBOT Soybeans (S)	60	119		14	17
	80	88		9	12
	100	27		6	8
	500	9			
CBOT Soybean Meal (SM)	60	52	*	20	35
	80	32	*	9	16
	100	12	*	6	9
CBOT Soybean Oil (SO)	60	114		31	37
	80	70		15	20
	100	20		10	12
	500	*			
CBOT Wheat (W)	60	46		22	32
	80	31		14	16
	100	14		9	12
	500	*			
ICE Cotton No. 2 (CT)	60	12		16	19
	80	7		11	14
	100	6		9	11
	500	*			
KCBT Hard Winter Wheat (KW)	60	33		36	40
	80	18		13	21
	100	14		9	13
	500	*			
MGEX Hard Red Spring Wheat (MWE)	60	11		17	24
	80	10		11	15
	100	6		9	9

[424] A review of preliminary swap open interest reported under part 20 indicates that open interest in swap referenced contracts is low, in comparison to futures open interest. Any open interest in swap referenced contracts would serve to increase the levels of the positions limits.

TABLE 11—UNIQUE PERSONS OVER PERCENTAGES OF PROPOSED POSITION LIMIT LEVELS, JANUARY 1, 2011, TO DECEMBER 31, 2012—Continued

Commodity type/core referenced futures contract	Percent of level	Unique persons over level			
		Spot month (physical-delivery)	Spot month (cash-settled)	Single month	All months
Other Agricultural					
CBOT Rough Rice (RR)	60	9	....	7	9
	80	6	....	5	5
	100	....	....	*	*
CME Milk Class III (DA)	60	NA	6	*	19
	80	NA	4	....	14
	100	NA	*	....	7
CME Feeder Cattle (FC)	60	NA	76	4	13
	80	NA	55	*	7
	100	NA	16	*	*
CME Lean Hog (LH)	60	NA	52	20	30
	80	NA	41	11	18
	100	NA	28	7	13
	500	NA	*	....	....
CME Live Cattle (LC)	60	37	....	13	27
	80	*	....	7	17
	100	*	....	4	12
ICUS Cocoa (CC)	60	*	....	24	29
	80	*	....	14	18
	100	*	....	10	12
ICE Coffee C (KC)	60	14	....	19	24
	80	13	....	8	14
	100	8	....	5	6
	500	2	....	....	....
ICE FCOJ–A (OJ)	60	8	....	13	16
	80	7	....	9	9
	100	6	....	6	7
ICE Sugar No. 11 (SB)	60	33	....	28	31
	80	23	....	20	24
	100	15	....	12	18
	500	*	....	....	....
ICE Sugar No. 16 (SF)	60	6	....	10	16
	80	5	....	7	14
	100	5	....	7	13
Energy					
NYMEX Henry Hub Natural Gas (NG)	60	177	221	*	5
	80	131	183	....	....
	100	61	148	....	....
	500	....	35	....	....
NYMEX Light Sweet Crude Oil (CL)	60	98	89	....	4
	80	72	62	....	*
	100	39	33	....	*
	500	....	....	....	....
NYMEX NY Harbor ULSD (HO)	60	76	45	9	18
	80	53	35	6	15
	100	33	24	5	8
	500	....	*	....	....
NYMEX RBOB Gasoline (RB)	60	71	45	21	30
	80	48	32	12	16
	100	30	22	7	11
	500	....	*	....	....
Metals					
COMEX Copper (HG)	60	14	....	29	28
	80	13	....	21	22
	100	*	....	16	16
COMEX Gold (GC)	60	13	....	24	21
	80	9	....	19	19
	100	5	....	12	12
COMEX Silver (SI)	60	5	....	25	21
	80	*	....	15	13
	100	*	....	10	9
NYMEX Palladium (PA)	60	6	....	5	5
	80	*	....	*	*

TABLE 11—UNIQUE PERSONS OVER PERCENTAGES OF PROPOSED POSITION LIMIT LEVELS, JANUARY 1, 2011, TO DECEMBER 31, 2012—Continued

Commodity type/core referenced futures contract	Percent of level	Unique persons over level			
		Spot month (physical-delivery)	Spot month (cash-settled)	Single month	All months
	100	*	....	*	*
NYMEX Platinum (PL)	60	11	....	15	18
	80	5	....	11	12
	100	*	....	9	10

Legend:
* means fewer than 4 unique owners exceeded the level.
— means no unique owners exceeded the level.
NA means not applicable.[425]

The Commission has also reviewed preliminary data submitted to it under part 20. The Commission preliminarily has decided not to use the data currently reported under part 20 for purposes of setting the initial levels of the proposed single month and all-months-combined positions limits. Instead, the Commission is proposing to set initial levels based on open interest in futures, options on futures, and SPDC swaps. Thus, the proposed initial levels represent lower bounds for the initial levels the Commission may establish in final rules. The Commission is providing the public with average open positions reported under part 20 for the month of January 2013, in the table below. As discussed below, the data reported during the month of January 2013, reflected improved data reporting quality. However, the Commission is concerned that the longer time series of this data has been less reliable and thus has not used it for purposes of setting proposed initial position limit levels.

TABLE 12—SWAPS REPORTED UNDER PART 20—AVERAGE DAILY OPEN POSITIONS, FUTURES EQUIVALENT, JANUARY 2013

Covered swap contract	Uncleared swaps	Cleared swaps
Chicago Board of Trade (“CBOT”) Corn	110,533	3,060
CBOT Ethanol	*	15,905
CBOT Oats	....	....
CBOT Rough Rice	....	....
CBOT Soybean Meal	20,594	....
CBOT Soybean Oil	35,760	....
CBOT Soybeans	39,883	1,306
CBOT Wheat	64,805	2,856
Chicago Mercantile Exchange (“CME”) Butter	....	....
CME Cheese	....	....
CME Dry Whey	....	....
CME Feeder Cattle	*	....
CME Hardwood Pulp	....	....
CME Lean Hog	12,809	....
CME Live Cattle	17,617	....
CME Milk Class III	....	....
CME Non Fat Dry Milk	....	....
CME Random Length Lumbar	....	....
CME Softwood Pulp	....	....
Commodity Exchange, Inc. (“COMEX”) Copper Grade No. 1	9,259	....
COMEX Gold	38,295	....
COMEX Silver	5,753	....
ICE Futures U.S. (“ICE”) Cocoa	8,933	....
ICE Coffee C	3,465	....
ICE Cotton No. 2	14,627	....
ICE Frozen Concentrated Orange Juice	*	....
ICE Sugar No. 11	287,434	....
ICE Sugar No. 16	....	....
Kansas City Board of Trade (“KCBT”) Wheat	2,565	....
Minneapolis Grain Exchange (“MGEX”) Wheat	2,419	....
NYSE LIFFE (“NYL”) Gold, 100 Troy Oz.	....	....
NYL Silver, 5000 Troy Oz.	....	....
New York Mercantile Exchange (“NYMEX”) Cocoa	....	....
NYMEX Brent Financial	93,825	....
NYMEX Central Appalachian Coal	....	....
NYMEX Coffee	2,320	....
NYMEX Cotton	8,315	....

[425] Table notes: (1) Aggregation exemptions were not used in computing the counts of unique persons; (2) the position data was for futures, futures options and swaps that are significant price discovery contracts (SPDCs).

TABLE 12—SWAPS REPORTED UNDER PART 20—AVERAGE DAILY OPEN POSITIONS, FUTURES EQUIVALENT, JANUARY 2013—Continued

Covered swap contract	Uncleared swaps	Cleared swaps
NYMEX Crude Oil, Light Sweet	507,710	....
NYMEX Gasoline Blendstock (RBOB).	10,110	....
NYMEX Hot Rolled Coil Steel	*	....
NYMEX Natural Gas	1,060,468	96,057
NYMEX No. 2 Heating Oil, New York Harbor	35,126	....
NYMEX Palladium	*	....
NYMEX Platinum	*	....

Legend:
* means fewer than 1,000 futures equivalent contracts reported in the category.
Leaders mean no contracts reported.

The part 20 data are comprised of positions resulting from cleared and uncleared swaps, which are reported by different reporting entities. Clearing members of derivative clearing organizations (''DCOs'') have reported paired swap positions in cleared swaps since November 11, 2011, and paired swap positions in uncleared swaps since January 20, 2012. DCOs have also reported aggregate positions of each clearing member's house and customer accounts for each paired swap since November 11, 2011. Data reports submitted by clearing members have had various errors (*e.g.,* duplicate records, inconsistent reporting of data fields)—Commission staff continues to work with these reporting entities to improve data reporting.

Beginning March 1, 2013, swap dealers that were not clearing members were required to submit data reports under § 20.4(c). Additionally, some swap dealers began reporting such data voluntarily prior to March 1, 2013.[426] As these new reporters submitted position data reports, the Commission observed a substantial increase in open interest for uncleared swaps that appeared unreasonable; it became apparent that part of this increase was caused by data reporting errors.[427] The Commission believes it would be difficult to distinguish the true level of open interest because some reporting errors may cause open interest to be underestimated while others may cause open interest to be overestimated.

Alternatively, the Commission is considering using part 20 data, should it determine such data to be reliable, in order to establish higher initial levels in a final rule.[428] Further, the Commission is considering using data from swaps data repositories, as practicable. In either case, the Commission is considering excluding inter-affiliate swaps, since such swaps would tend to inflate open interest.

Based on the forgoing, the Commission believes the initial levels proposed herein should ensure adequate liquidity for hedges yet nevertheless prevent a speculative trader from acquiring excessively large positions above the limits, and thereby help to prevent excessive speculation and to deter and prevent market manipulation.

(2) Subsequent Levels

For setting subsequent levels of non-spot month limits, the Commission proposes to estimate average open interest in referenced contracts using data reported by DCMs and SEFs pursuant to parts 16, 20, and/or 45.[429] While the Commission does not currently possess all data needed to fully enforce the position limits proposed herein, the Commission believes that it should have adequate data to reset the overall concentration-based percentages for the position limits two years after initial levels are set.[430] The Commission intends to use comprehensive positional data on physical commodity swaps once such data is collected by swap data repositories under part 45, and would convert such data to futures-equivalent open positions in order to fix numerical position limits through the application of the proposed open-interest-based position limit formula. The resultant limits are purposely designed to be high enough to ensure sufficient liquidity for bona fide hedgers and to avoid disrupting the price discovery process given the limited information the Commission has with respect to the size of the physical commodity swap markets, including preliminary data collected under part 20 as of January 2013. The Commission further proposes to publish on the Commission's Web page such estimates of average open interest in referenced contracts on a monthly basis to make it easier for market participants to estimate changes in levels of position limits.

f. Grandfather of Pre-Existing Positions

The Commission proposes in new § 150.2(f)(2) to conditionally exempt from federal non-spot-month speculative position limits any referenced contract position acquired by a person in good faith prior to the effective date of such limit, provided that such pre-existing referenced contract position is attributed to the person if such person's position is increased after the effective date of such limit.[431] This conditional exemption for pre-existing positions is consistent with the provisions of CEA section 4a(b)(2) in

[426] Further, other firms have begun to report under part 20 after March 1, 2013, following registration as swap dealers.

[427] For example, reported total open interest in swaps, both cleared and uncleared, linked to or based on NYMEX Natural Gas futures contracts averaged approximately 1.2 million contracts between January 1, 2013 and March 1, 2013 and approximately 97 million contracts between March 1 and May 31, 2013 (with a peak value close to 300 million contracts).

[428] Several reporting entities have submitted data that contained stark errors. For example, certain reporting entities submitted position sizes that the Commission determined to be 1000 times, or even 10,000 times, too large.

[429] Options listed on DCMs would be adjusted using an option delta reported to the Commission pursuant to 17 CFR part 16; swaps would be counted on a futures equivalent basis, equal to the economically equivalent amount of core referenced futures contracts reported pursuant to 17 CFR part 20 or as calculated by the Commission using swap data collected pursuant to17 CFR part 45.

[430] While the Commission has access to some data on physical-commodity swaps from swaps data repositories, the Commission continues to work with SDRs and other market participants to fully implement the swaps data reporting regime.

[431] Such pre-existing positions that are in excess of the proposed position limits would not cause the trader to be in violation based solely on those positions. To the extent a trader's pre-existing positions would cause the trader to exceed the non-spot-month limit, the trader could not increase the directional position that caused the positions to exceed the limit until the trader reduces the positions to below the position limit. As such, persons who established a net position below the speculative limit prior to the enactment of a regulation would be permitted to acquire new positions, but the Commission would calculate the combined position of a person based on pre-existing positions with any new position.

that it is designed to phase in position limits without significant market disruption, while attributing such pre-existing positions to the person if such person's position is increased after the effective date of a position limit is consistent with the provisions of CEA section 22(a)(5)(B). Notwithstanding this exemption for pre-existing positions in non-spot months, proposed § 150.2(f)(1) would require a person holding a pre-existing referenced contract position (in a commodity derivative contract other than a pre-enactment and transition period swaps as defined in proposed § 150.1) to comply with spot month speculative position limits.[432] The Commission remains particularly concerned about protecting the spot month in physical-delivery futures contracts from squeezes and corners.

Proposed § 150.2(g) would apply position limits to foreign board of trade (''FBOT'') contracts that are both: (1) Linked contracts, that is, a contract that settles against the price (including the daily or final settlement price) of one or more contracts listed for trading on a DCM or SEF; and (2) direct-access contracts, that is, the FBOT makes the contract available in the United States through direct access to its electronic trading and order matching system through registration as an FBOT or via a staff no action letter.[433] Proposed § 150.2(g) is consistent with CEA section 4a(a)(6)(B), which directs the Commission to apply aggregate position limits to FBOT linked, direct-access contracts.[434]

3. Section 150.3—Exemptions

i. Current § 150.3

CEA section 4a(c)(1) exempts bona fide hedging transactions or positions, which terms are to be defined by the Commission, from any rule promulgated by the Commission under CEA section 4a concerning speculative position limits.[435] Current § 150.3, adopted by the Commission before the Dodd-Frank Act was enacted, contains an exemption from federal position limits for bona fide hedging transactions.[436] Additionally, Dodd-Frank added section 4a(a)(7) to the CEA, which gives the Commission authority to provide exemptions from any requirement the Commission establishes under section 4a with respect to speculative position limits.[437]

The existing exemptions promulgated under pre-Dodd-Frank CEA section 4a and set forth in current § 150.3 are fundamental to the Commission's regulatory framework for speculative position limits. Current § 150.3 specifies the types of positions that may be exempted from, and thus may exceed, the federal speculative position limits. First, the exemption for bona fide hedging transactions and positions as defined in current § 1.3(z) permits a commercial enterprise to exceed positions limits to the extent the positions are reducing price risks incidental to commercial operations.[438] Second, the exemption for spread or arbitrage positions between single months of a futures contract (and/or, on a futures-equivalent basis, options) outside of the spot month, permits any trader's spread position to exceed the single month limit.[439] Third, positions carried for an eligible entity[440] in the separate account of an independent account controller (''IAC'')[441] that manages customer positions need not be aggregated with the other positions owned or controlled by that eligible entity (the ''IAC exemption'').[442]

ii. Proposed § 150.3

In this release, the Commission proposes organizational and substantive amendments to § 150.3, generally resulting in an increase in the number of exemptions to speculative position limits. First, the Commission proposes to amend the three exemptions from federal speculative limits currently contained in § 150.3. These amendments would update cross references, relocate the IAC exemption and consolidate it with the Commission's separate proposal to amend the aggregation requirements of § 150.4,[443] and delete the calendar month spread provision which is unnecessary under proposed changes to § 150.2 that would increase the level of the single month position limits. Second, the Commission proposes to add exemptions from the federal speculative position limits for financial distress situations, certain spot-month positions in cash-settled referenced contracts, and grandfathered pre-Dodd-Frank and transition period swaps. Third, the Commission proposes to revise recordkeeping and reporting requirements for traders claiming any exemption from the federal speculative position limits.

a. Proposed Amendments to Existing Exemptions

(1) New Cross-References

Because the Commission proposes to replace the definition of bona fide hedging in 1.3(z) with the definition in proposed § 150.1, proposed § 150.3(a)(1)(i) updates the cross-references to reflect this change.[444] Proposed § 150.3(a)(3) would add a new cross-reference to the reporting requirements proposed to be amended in part 19.[445] As is currently the case for bona fide hedgers, persons who wish to claim any exemption from federal position limits, including hedgers, would need to satisfy the reporting requirements in part 19.[446] As discussed elsewhere in this release, the Commission is proposing amendments to update part 19 reporting.[447] For purposes of simplicity, the Commission is retaining the current placement of many reporting requirements, including those related to claimed exemptions from the federal position limits, within

[432] Nothing in proposed § 150.2(f) would override the exemption set forth in proposed § 150.3(d) for pre-enactment and transition period swaps from speculative position limits. *See* discussion of proposed § 150.3(d) below.

[433] Proposed § 150.2(g) is identical in substance to vacated § 151.8. *Compare* 76 FR 71693.

[434] *See supra* discussion of CEA section 4a(a)(6) concerning aggregate position limits and the treatment of FBOT contracts.

[435] 7 U.S.C. 6a(c)(1).

[436] Bona fide hedging transactions and positions for excluded commodities are currently defined at 17 CFR § 1.3(z). As discussed above, the Commission has proposed a new comprehensive definition of bona fide hedging positions in proposed § 150.1.

[437] 7 U.S.C. 6a(a)(7). Section 4a(a)(7) of the CEA provides the Commission plenary authority to grant exemptive relief from position limits. Specifically, under Section 4a(a)(7), the Commission ''by rule, regulation, or order, may exempt, conditionally or unconditionally, any person, or class of persons, any swap or class of swaps, any contract of sale of a commodity for future delivery or class of such contracts, any option or class of options, or any transaction or class of transactions from any requirement it may establish . . . with respect to position limits.''

[438] 17 CFR 150.3(a)(1). The current definition of bona fide hedging transactions and positions in 1.3(z) is discussed above.

[439] The Commission clarifies that a spread or arbitrage position in this context means a short position in a single month of a futures contract and a long position in another contract month of that same futures contract, outside of the spot month, in the same crop year. The short and/or long positions may also be in options on that same futures contract, on a futures equivalent basis. Such spread or arbitrage positions, when combined with any other net positions in the single month, must not exceed the all-months limit set forth in current § 150.2, and must be in the same crop year. 17 CFR 150.3(a)(3).

[440] ''Eligible entity'' is defined in current 17 CFR 150.1(d).

[441] ''Independent account controller'' is defined in 17 CFR 150.1(e).

[442] *See* 17 CFR 150.3(a)(4). *See also* discussion of the IAC exemption in the Aggregation NPRM.

[443] *See* Aggregation NPRM.

[444] *See supra* discussion of the Commission's revised definition of bona fide hedging position in proposed § 150.1.

[445] *See infra* discussion of proposed revisions of 17 CFR part 19.

[446] *See* 17 CFR part 19.

[447] *See infra* discussion of proposed revisions of 17 CFR part 19.

parts 15–21 of the Commission's regulations.[448] Lastly, proposed § 150.3(i) would add a cross-reference to the updated aggregation rules in proposed § 150.4.[449] The Commission proposes to retain the current practice of considering entities required to aggregate accounts or positions under proposed § 150.4 to be the same person when determining whether they are eligible for a bona fide hedging position exemption.[450]

(2) Deleting Exemption for Calendar Spread or Arbitrage Positions

The Commission proposes to delete the exemption in current § 150.3(a)(3) for spread or arbitrage positions between single months of a futures contract or options thereon, outside the spot month.[451] The Commission has proposed to maintain the current practice in § 150.2, which the district court did not vacate, of setting single-month limits at the same levels as all-months limits, rendering the ''spread'' exemption unnecessary. The spread exemption set forth in current § 150.3(a)(3) permits a spread trader to exceed single month limits only to the extent of the all months limit.[452] Since proposed § 150.2 sets single month limits at the same level as all months limits, the spread exemption no longer provides useful relief. Furthermore, as discussed below in this release, the Commission would codify guidance in proposed § 150.5(a)(2)(B) that would allow a DCM or SEF to grant exemptions for intramarket and intermarket spread positions (as those terms are defined in proposed § 150.1) involving commodity derivative contracts subject to the federal limits.[453]

(3) Relocating Independent Account Controller (''IAC'') Exemption to proposed § 150.4

In a separate rulemaking, the Commission has proposed § 150.4(b)(5) to replace the existing IAC exemption in current § 150.3(a)(4).[454] Proposed § 150.4(b)(5) sets forth an exemption for accounts carried by an IAC that is substantially similar to current § 150.3(a)(4). Thus, the Commission is proposing to delete the IAC exemption in current § 150.3(a)(4) because it is duplicative.

b. Proposed Additional Exemptions From Position Limits

As discussed above, CEA section 4a(a)(7) provides that the Commission may ''by rule, regulation, or order . . . exempt . . . any person or class of persons'' from any requirement that the Commission may establish under section 4a of the Act. Pursuant to this authority, the Commission proposes to add new exemptions in § 150.3 for financial distress situations and qualifying positions in cash-settled referenced contracts. The Commission also proposes to add guidance to persons seeking exemptive relief for certain qualifying non-enumerated risk-reducing transactions. Additionally, the Commission proposes to grandfather pre-Dodd-Frank enactment swaps and transition swaps entered into before from position limits.

(1) Financial Distress Exemption

The Commission proposes to add an exemption from position limits for certain market participants in certain financial distress scenarios to § 150.3(b). During periods of financial distress, it may be beneficial for a financially sound entity to take on the positions (and corresponding risk) of a less stable market participant. The Commission historically has provided for an exemption from position limits in these types of situations, to avoid sudden liquidations that could potentially reduce liquidity, disrupt price discovery, and/or increase systemic risk.[455] Therefore, the Commission now proposes to codify in regulation its prior exemptive practices to accommodate situations involving, for example, a customer default at a FCM, or in the context of potential bankruptcy. The Commission historically has not granted such an exemption by Commission Order due to concerns regarding timeliness and flexibility. Furthermore, the Commission clarifies that this exemption for financial distress situations is not a hedging exemption.

(2) Conditional Spot-Month Limit Exemption

Proposed § 150.3(c) would provide a conditional spot-month limit exemption that permits traders to acquire positions up to five times the spot-month limit if such positions are exclusively in cash-settled contracts. This conditional exemption would only be available to traders who do not hold or control positions in the spot-month physical-delivery referenced contract. Historically, the Commission and Congress have been particularly concerned about protecting the spot month in physical-delivery futures contracts.[456] For example, new CEA section 4c(a)(5)(B) makes it unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period. The Commission interprets the closing period to be defined generally as the period in the contract or trade when the settlement price is determined under the rules of a trading facility such as a DCM or SEF, and may include the time period in which a daily settlement price is determined and the expiration day for a futures contract.[457]

This proposed conditional exemption for cash-settled contracts generally tracks exchange-set position limits currently implemented for certain cash-settled energy futures and swaps.[458] The

[448] The Commission notes this is a change from the organization of vacated § 151.5, that included both exemptions and related reporting requirements in a single section.

[449] *See* Aggregation NPRM.

[450] *See* Aggregation NPRM. The Commission clarifies that whether it is economically appropriate for one entity to offset the cash market risk of an affiliate depends, in part, upon that entity's ownership interest in the affiliate. It would not be economically appropriate for an entity to offset all the risk of an affiliate's cash market exposure unless that entity held a 100 percent ownership interest in the affiliate. For less than a 100 percent ownership interest, it would be economically appropriate for an entity to offset no more than a pro rata amount of any cash market risk of an affiliate, consistent with the entity's ownership interest in the affiliate.

[451] In its entirety, 17 CFR 150.3(a)(3) sets forth an exemption from federal position limits for [s]pread or arbitrage positions between single months of a futures contract and/or, on a futures-equivalent basis, options thereon, outside of the spot month, in the same crop year; *provided however,* that such spread or arbitrage positions, when combined with any other net positions in the single month, do not exceed the all-months limit set forth in § 150.2.

[452] *See id.*

[453] As discussed above.

[454] For purposes of simplicity, the IAC exemption would be placed within the regulatory section providing for aggregation of positions. *See* Aggregation NPRM.

[455] *See* Release 5551–08, ''CFTC Update on Efforts Underway to Oversee Markets,'' September 19, 2008 (available at *http://www.cftc.gov/PressRoom/PressReleases/pr5551-08*).

[456] *See,* for example, the guidance for DCMs to establish a spot month limit in physical-delivery futures contracts that is no greater than 25 percent of estimated deliverable supply in 17 CFR 150.5(b).

[457] *See* Antidisruptive Practices Authority, Interpretive guidance and policy statement, 78 FR 31890, 31894, May 28, 2013. *See also* the discussion above of ''banging the close'' and the *DiPlacido* case.

[458] For example, this is the same methodology for spot-month speculative position limits that applies to cash-settled Henry Hub natural gas contracts on NYMEX and ICE, beginning with the February 2010 contract months (with the exception of the exchange-set requirement that a trader not hold large cash commodity positions). In response to concerns regarding increasing trading volumes in standardized swaps, in 2008 Congress amended section 2(h) of the Act to establish core principles for exempt commercial markets (''ECMs'') trading swap contracts that the Commission determined to be significant price discovery contracts (''SPDCs''). 7 U.S.C. 2(h)(7) (2009). *See also* section 13201 of the Food, Conservation and Energy Act of 2008, H.R. 2419 (May 22, 2008). Core principle (IV) directed ECMs to ''adopt, where necessary and appropriate, position limitations or position accountability for speculators . . . to reduce the

Commission has examined market data on the effectiveness of conditional spot-month limits for cash-settled energy futures swaps, including the data submitted as part of the prior position limits rulemaking,[459] and preliminarily believes that the conditional approach effectively addresses the § 4a(a)(3) regulatory objectives. Since spot-month limit levels for cash-settled referenced contracts will be set at no more than 25% of the estimated spot-month deliverable supply in the relevant core referenced futures contract, the proposed conditional exemption would therefore permit a speculator to own positions in cash-settled referenced contracts equivalent to no more than 125% of the estimated deliverable supply.

As proposed, this broad conditional spot month limit exemption for cash-settled contracts would be similar to the conditional spot month limit for cash-settled contracts in proposed § 151.4.[460] However, unlike proposed § 151.4, proposed § 150.3(c) would not require a trader to hold physical commodity inventory of less than or equal to 25 percent of the estimated deliverable supply in order to qualify for the conditional spot month limit exemption. Rather, the Commission proposes to require enhanced reporting of cash market holdings of traders availing themselves of the conditional spot month limit exemption, as discussed in the proposed changes to part 19, below.[461] The Commission preliminarily believes that an enhanced reporting regime may serve to provide sufficient information to conduct an adequate surveillance program to detect and potentially deter excessively large positions or manipulative schemes involving the cash market.

The Commission notes that the proposed conditional spot month limit is a change of course from the expanded spot month limit that was only for natural gas referenced contracts in vacated § 151.4.[462] In proposing to expand the scope of derivatives contracts for which the conditional spot month limit is available, the Commission has reconsidered the risks to the market of permitting a speculative trader to hold an expanded position in a cash-settled contract when that speculative trader also is active in the underlying physical-delivery contract. The Commission preliminarily believes the conditional natural gas spot month limits of the exchanges generally have served to further the purposes Congress articulated for positions limits in sections 4a(a)(3)(B) and 4c(a)(5)(B) of the Act, such as deterring market manipulation, ensuring the price discovery function of the underlying market is not disrupted, and deterring disruptive trading during the closing period. The Commission notes those exchange-set conditional limits, as is the case for the proposed rule, prohibit a speculative trader who is holding an expanded position in a cash-settled contract from also holding any position in the physical-delivery contract.

The proposed conditional exemption would satisfy the goals set forth in CEA section 4a(a)(3)(B) by: Eliminating all speculation in a physical-delivery contract during the spot period by a trader availing herself of the conditional spot month limit exemption; ensuring sufficient market liquidity in the cash-settled contract for bona fide hedgers, in light of the typically rapidly decreasing levels of open interest in the physical-delivery contract during the spot month as hedgers exit the physical-delivery contract; and protecting the price discovery process in the physical-delivery contract from the risk that traders with leveraged positions in cash-settled contracts (in comparison to the level of the limit in the physical-delivery contract) would otherwise attempt to mark the close or distort physical-delivery prices to benefit their leveraged cash-settled positions. Thus, the exemption would establish a higher conditional limit for cash-settled contracts than for physical delivery contracts, so long as such positions are decoupled from positions in physical delivery contracts which set or affect the value of such cash-settled positions.

The Commission preliminarily believes this proposed exemption would not encourage price discovery to migrate to the cash-settled contracts in a way that would make the physical-delivery contract more susceptible to sudden price movements near expiration. The Commission has observed, repeatedly, that open interest in physical-delivery contracts typically declines markedly in the period immediately preceding the spot month. Open interest typically declines to minimal levels prior to the close of trading in physical-delivery contracts. The Commission notes a hedger with a long position need not stand for delivery when the price of a physical-delivery contract has adequately converged to the underlying cash market price; rather, such long position holder may offset and purchase needed commodities in the cash market at a comparable price that meets the hedger's specific location and quality needs. Similarly, the Commission notes a hedger with a short position need not give notice of intention to deliver and deliver when the price of a physical-delivery contract has adequately converged to the underlying cash market price; rather, such short position holder may offset and sell commodities held in inventory or current production in the cash market at a comparable price that is consistent with the hedger's specific storage location and quality of inventory or production.[463] Concerns regarding corners and squeezes are most acute in the markets for physical contracts in the spot month, which is why speculative limits in physical delivery markets are generally set at levels that are stricter during the spot month. The Commission seeks comment on whether a conditional spot-month

potential threat of market manipulation or congestion, especially during trading in the delivery month.'' 7 U.S.C. 2(h)(7)(C)(ii)(IV)(2009). Under the Commission's rules for ECMs trading SPDCs, the Commission provided an acceptable practice that an ECM trading a SPDC that is economically-equivalent to a contract traded on a DCM should set the spot-month limit at the same level as that specified for the economically-equivalent DCM contract. 17 CFR part 36 (2010). In practice, for example, ICE complied with this requirement by establishing a spot month limit for its natural gas SPDC at the same level as the spot month limit in the economically-equivalent NYMEX Henry Hub Natural Gas futures contract. Both ICE and NYMEX established conditional spot month limits in their cash-settled natural gas contracts at a level five times the level of the spot month limit in the physical-delivery futures contract.

459 *See* 76 FR 71635 (n. 100–01)(discussing data for the CME natural gas contract).

460 With respect to cash-settled contracts, proposed § 151.4 incorporated a conditional spot-month limit permitting traders without a hedge exemption to acquire position levels that are five times the spot-month limit if such positions are exclusively in cash-settled contracts (*i.e.,* the trader does not hold positions in the physical-delivery referenced contract) and the trader holds physical commodity positions that are less than or equal to 25 percent of the estimated deliverable supply. *See* Proposed Rule, 76 FR 4752, 4758, Jan. 26, 2011.

461 *See infra* discussion of proposed revisions to part 19.

462 Under vacated § 151.4, the Commission would have applied spot-month position limits for cash-settled contracts using the same methodology as applied to the physical-delivery core referenced futures contracts, with the exception of natural gas contracts, which would have a class limit and aggregate limit of five times the level of the limit for the physical-delivery Core Referenced Futures Contract. 76 FR 71635.

463 Once the price of a physical-delivery contract has converged adequately to cash market prices, long and short position holders typically offset physical-delivery contracts. Prior to such adequate convergence, the Commission has observed when a physical-delivery contract is trading at a price above prevailing cash market prices, commercials with inventory tend to sell contracts with the intent of making delivery, causing physical-delivery prices to converge to cash market prices. Similarly, the Commission has observed when a physical-delivery contract is trading at a price below prevailing cash market prices, commercials with a need for the commodity or merchants active in the cash market tend to buy the contract with the intent of taking delivery, causing physical-delivery prices to converge to cash market prices.

limit exemption adequately protects the price discovery function of the underlying physical-delivery market. Further, the Commission solicits comment on its conditional spot month limit, including whether it is advisable to expand this conditional limit to all contracts. Additionally, the Commission solicits comment on whether the conditional spot-month limit has effectively addressed and will continue to address the CEA section 4a(a)(3) regulatory objectives. Are there other concerns or issues regarding the proposed conditional spot month limit exemption that the Commission has not addressed?

While traders who avail themselves of a conditional spot month limit exemption could not directly influence particular settlement prices by trading in the physical-delivery referenced contract, the Commission remains concerned about such traders' activities in the underlying cash commodity. Accordingly, the Commission proposes new reporting requirements in part 19, as discussed below.[464] The Commission invites comment and empirical analysis as to whether these reporting requirements adequately address concerns regarding: (1) Protecting the price discovery function of the physical-delivery market, including deterring attempts to mark the close in the physical-delivery contract; and (2) providing adequate liquidity for bona fide hedgers in the physical-delivery contracts. In light of these two concerns, the Commission is also proposing alternatives to the conditional spot-month limit exemption, as discussed below, including the possibility that it would not adopt the proposed conditional spot-month limit exemption.

As one alternative to the proposed conditional spot month limit, the Commission is considering whether to restrict a trader claiming the conditional spot-month limit exemption to positions in cash-settled contracts that settle to an index based on cash-market transactions prices. This would prohibit traders from claiming a conditional exemption if the trader held positions in the spot-month of cash-settled contracts that settle to prices based on the underlying physical-delivery futures contract. If the Commission adopted this alternative instead of the proposal, would the physical-delivery futures contract market be better protected? Why or why not?

The Commission is also considering a second alternative to the proposed conditional spot month limit: Setting an expanded spot-month limit for cash-settled contracts at five times the level of the limit for the physical-delivery core referenced futures contract, regardless of positions in the underlying physical-delivery contract. This alternative would not prohibit a trader from carrying a position in the spot-month of the physical-delivery contract. Consequently, this alternative would give more weight to protecting liquidity for bona fide hedgers in the physical-delivery contract in the spot month, and less weight to protecting the price discovery function of the underlying physical-delivery contract in the spot month.[465] Given Congressional concerns regarding disruptive trading practices in the closing period, as discussed above, would this second alternative adequately address the policy factors in CEA section 4a(a)(3)(B)?

The Commission is also considering a third alternative: Limiting application of an expanded spot-month limit to a trader holding positions in cash-settled contracts that settle to an index based on cash-market transactions prices. Under this third alternative, cash-settled contracts that settle to the underlying physical-delivery contract would be restricted by a spot-month limit set at the same level as that of the underlying physical-delivery contract. The Commission is considering an aggregate spot-month limit on all types of cash-settled contracts set at five times the level of the limit of the underlying physical-delivery contract for this alternative to the proposed conditional spot month limit. Would this third alternative adequately address the policy factors in CEA section 4a(a)(3)(B)? Would this third alternative better address such policy factors than the second alternative?

The Commission requests comment on all aspects of the proposed conditional spot limit and the three alternatives discussed above, including whether conditional spot month limit exemptions should vary based on the underlying commodity. Should the Commission consider any other alternatives? If yes, please describe any alternative in detail. Would any of the proposed conditional spot month limit or the alternatives be more or less likely to increase or decrease liquidity in particular products? Would anti-competitive behavior be more or less likely to result from any of the proposed conditional spot month limit or the alternatives? Does any of the proposed conditional spot month limit or the alternatives increase the potential for manipulation? If yes, please provide detailed arguments and analyses.

(3) Exemption for Pre-Dodd-Frank Enactment Swaps and Transition Period Swaps

Proposed § 150.3(d) would provide an exemption from federal position limits for (1) swaps entered into prior to July 21, 2010 (the date of the enactment of the Dodd-Frank Act of 2010), the terms of which have not expired as of that date, and (2) swaps entered into during the period commencing July 22, 2010, the terms of which have not expired as of that date, and ending 60 days after the publication of final § 150.3 in the **Federal Register**.[466] However, the Commission would allow both pre-enactment and transition swaps to be netted with commodity derivative contracts acquired more than 60 after publication of final § 150.3 in the **Federal Register** for the purpose of complying with any non-spot-month position limit.

(4) Other Exemptions for Non-Enumerated Risk-Reducing Practices

The Commission notes that the enumerated list of bona fide hedging positions as set forth in proposed § 150.1 represents an expanded list of exemptions that has evolved over many years of the Commission's experience in administering speculative position limits. The Commission has carefully expanded the list of exemptions in light of the statutory directive to define a bona fide hedging position in section 4a(c)(2) of the Act.

The Commission previously permitted a person to file an application seeking approval for a non-enumerated position to be recognized as a bona fide hedging position under § 1.47. The Commission proposes to delete § 1.47 for several reasons. First, § 1.47 did not provide guidance as to the standards the Commission would use to determine whether a position was a bona fide

[464] *See infra* discussion of proposed revisions of part 19.

[465] This second alternative would effectively adopt for all commodity derivative contract limits certain provisions of vacated § 151.4 (that would have been applicable only to contracts in natural gas). As noted above, under vacated § 151.4, the Commission would have applied a spot-month position limit for cash-settled contracts in natural gas at a level of five times the level of the limit for the physical-delivery Core Referenced Futures Contract in natural gas. *Id.*

[466] This exemption is consistent with CEA section 4a(b)(2). The time period for transition swaps for purposes of position limits differs from the time period for transition swaps for purposes of swap data recordkeeping and reporting requirements. In both cases, the time periods for transition swaps begins on the date of enactment of the Dodd-Frank Act. However, the time periods for transition swaps end prior to the compliance date for each relevant rule. Swap data recordkeeping and reporting requirements for pre-enactment and transition period swaps are listed in 17 CFR part 46.

hedging position. Second, in the Commission's experience, the overwhelming number of applications filed under § 1.47 were from swap intermediaries seeking to offset the risk of swaps. Section 4a(c)(2) of the Act addresses the application of the bona fide hedging definition to certain positions that reduce risks attendant to a position resulting from certain swaps. As discussed in the definitions section above, those statutory provisions have been incorporated into the proposed definition of a bona fide hedging position under § 150.1; further, as discussed in the position limits section above, the provisions of proposed § 150.2 include relief outside of the spot month to permit automatic netting of swaps that are referenced contracts with futures contracts that are referenced contracts and, where appropriate, to recognize as a bona fide hedging position the offset of certain non-referenced contract swaps with futures that are referenced contracts.[467] Third, § 1.47 provided specific, limited timeframes (of 30 days or 10 days) for the Commission to determine whether the position may be classified as bona fide hedging. The Commission preliminarily believes it should not constrain itself to such limited timeframes for review of potentially complex and novel risk-reducing transactions.

Nevertheless, the Commission proposes in § 150.3(e) to provide guidance to persons seeking exemptive relief. A person that engages in risk-reducing practices commonly used in the market that the person believes may not be included in the list of enumerated bona fide hedging transactions may apply to the Commission for an exemption from position limits. As proposed, market participants would be guided in § 150.3(e) first to consult proposed appendix C to part 150 to see whether their practices fall within a non-exhaustive list of examples of bona fide hedging positions as defined under proposed § 150.1.

A person engaged in risk-reducing practices that are not enumerated in the revised definition of bona fide hedging in proposed § 150.1 may use two different avenues to apply to the Commission for relief from federal position limits: The person may request an interpretative letter from Commission staff pursuant to § 140.99[468] concerning the applicability of the bona fide hedging position exemption, or the person may seek exemptive relief from the Commission under section 4a(a)(7) of the Act.[469]

(5) Previously Granted Risk Management Exemptions

Until about mid-2008, the Commission accepted and approved filings pursuant to § 1.3(z) and § 1.47 for recognition of transactions and positions described in such filings as bona fide hedging for purposes of compliance with Federal position limits. Since then, the Division of Market Oversight (the ''Division''), on behalf of the Commission, has only considered revisions to previously recognized filings.[470] Prior to the Dodd-Frank Act and pursuant to authority delegated to it under § 140.97,[471] the Division recognized a broad range of transactions and positions as bona fide hedges based on facts and representations contained in such filings.[472] In seeking these determinations and exemptions from Federal position limits, filers would furnish information to demonstrate, among other things, that the described transactions and positions were economically appropriate to the reduction of risk exposure attendant to the conduct and management of a commercial enterprise.[473] On this basis, the Division provided relief to dealers, market makers and ''risk intermediaries'' facing not only producers and consumers of commodities but hedge funds, pension funds and other financial institutions who lacked the capacity to make or take delivery of, or otherwise handle, a physical commodity.[474] The exemptions granted by the Division were not limited to futures to offset price risks associated with commodity index swaps that could be hedged in the component futures contracts. Filers obtained exemptions for futures transactions used to hedge price risks from transactions involving options, warrants, certificates of deposit, structured notes and various other structured products and hybrid instruments referencing commodities or embedding transactions linked to the payout or performance of a commodity or basket of commodities (collectively, ''financial products''). In sum, the Division provided relief to ''persons using the futures markets to manage risks associated with financial investment portfolios'' and granted exemptions from speculative position limits to a broad range of ''trading strategies to reduce financial risks, regardless of whether a matching transaction ever took place in a cash market for a physical commodity.'' [475] In

[467] All the exemptions granted by the Commission pursuant to § 1.47 involving swaps were restricted to recognition of the futures offset as a bona fide hedging position only outside of the spot month.

[468] 17 CFR 140.99 defines three types of staff letters—exemptive letters, no-action letters, and interpretative letters—that differ in scope and effect. An interpretative letter is written advice or guidance by the staff of a division of the Commission or its Office of the General Counsel. It binds only the staff of the division that issued it (or the Office of the General Counsel, as the case may be), and third-parties may rely upon it as the interpretation of that staff. *See* description of CFTC Staff Letters, *available at http://www.cftc.gov/lawregulation/cftcstaffletters/index.htm*.

[469] *See supra* discussion of CEA section 4a(a)(7).

[470] On May 29, 2008, the Commission announced a number of initiatives to increase transparency of the energy futures markets. In particular, the Commission would review the trading practices of index traders in the futures markets. CFTC Press Release 5503–08, May 29, 2008, available at *http://www.cftc.gov/PressRoom/PressReleases/pr5503-08.* On June 3, 2008, the Commission announced policy initiatives aimed at addressing concerns raised at an April 22, 2008 roundtable regarding events affecting the agricultural futures markets. Among other things, the Commission withdrew proposed rulemakings that would have increased the Federal speculative position limits on certain agricultural futures contracts and created a risk-management hedge exemption from the Federal speculative position limits for agricultural futures and options contracts. At the time, Acting Chairman Lukken and Commissioners Dunn, Sommers and Chilton said, ''. . . the Commission will be cautious and guarded before granting additional exemptions in this area.'' CFTC Press Release 5504–08, June 3, 2008, available at *http://www.cftc.gov/PressRoom/PressReleases/pr5504-08.*

[471] 17 CFR 140.97.

[472] Almost all requests pursuant to § 1.47 have been for ''risk-management'' exemptions. *See generally* Risk Management Exemptions from Speculative Position Limits Approved under Commission Regulation 1.61, 52 FR 34633, Sep. 14, 1987; Clarification of Certain Aspects of the Hedging Definition, 52 FR 27195, Jul. 20, 1987. The Commission first approved a request for a risk-management exemption in 1991. The Commission has also approved a request by a foreign government to recognize certain positions associated with a governmental agricultural support program that would be consistent with the examples of bona fide hedging positions in proposed appendix B to part 150.

[473] Section 1.3(z)(1) includes the language, ''economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise.'' 17 CFR 1.3(z)(1). Section 1.47(b)(2) includes the language, ''economically appropriate to the reduction of risk exposure attendant to the conduct and management of a commercial enterprise.'' 17 CFR 1.47(b)(2).

[474] The Commission notes that both the filings received by the Commission requesting such exemptions and the responding exemption letters issued by the Division are confidential in light of section 8 of the Act since, as noted above, the filings included information that described transactions and positions in order to demonstrate, among other things, that the transactions and positions were economically appropriate to the reduction of risk exposure attendant to the conduct and management of a commercial enterprise, while the Division's responding letters included information regarding the nature of the price risks that the transactions would entail.

[475] Staff Report, S. Permanent Subcomm. on Investigations, ''Excessive Speculation in the Wheat Market,'' S. Hrg. 111–155 (Jul. 21, 2009) at 13 (''Wheat Report''). The Wheat Report was issued before the Dodd-Frank Act became law.

recognizing such trading strategies as bona fide hedges, the Commission was responding to Congressional direction[476] to update its approach at a time when many sought to encourage what was then thought to be benign or beneficial financial innovation. In hindsight, the sum of these determinations may have exceeded what would be appropriate ''to permit producers, purchasers, sellers, middlemen, and users of a commodity or product derived therefrom to hedge their legitimate anticipated business needs'' and adequate ''to prevent unwarranted price pressures by large hedgers.'' [477]

The Commission now proposes a definition of bona fide hedging position that would apply to all referenced contracts, and proposes to remove § 1.47.[478] The Commission is also proposing in § 150.3(f) that risk-management exemptions granted by the Commission under § 1.47 shall not apply to swap positions entered into after the effective date of a final position limits rulemaking, *i.e.,* revoking the exemptions for new swap positions.[479] This means that certain transactions and positions (and, by extension, persons party to such transactions or holding such positions) heretofore exempt from Federal position limits may be subject to Federal position limits. This is because some transactions and positions previously characterized as ''risk-management'' and recognized as bona fide hedges are inconsistent with the revised definition of bona fide hedging positions proposed in this release and the purposes of the Dodd-Frank Act amendments to the CEA.[480] As noted above, some pre-Dodd-Frank Act exemptions recognized offsets of risks from financial products. But the Commission now proposes to incorporate the ''temporary substitute'' test of section 4a(c)(2)(A)(i) of the Act in paragraph (2)(i) of the proposed definition of bona fide hedging position.[481] Financial products are not substitutes for positions taken or to be taken in a physical marketing channel. Thus, the offset of financial risks arising from financial products is inconsistent with the proposed definition of bona fide hedging for physical commodities. Moreover, the Commission interprets CEA section 4a(c)(2)(B) as a direction from Congress to narrow the scope of what constitutes a bona fide hedge.[482] Other things being equal, a narrower definition of bona fide hedging would logically subject more speculative positions to Federal limits.

Many of the Commission's bona fide hedging exemptions prior to the Dodd-Frank Act provided relief from Federal speculative position limits for persons acting as intermediaries in connection with index trading activities.[483] For example, a pension fund enters into a swap to receive the rate of return on a particular commodity index (such as the Standard & Poor's–Goldman Sachs Commodity Index or the Dow Jones–UBS Commodity Index) with a swap dealer. The pension fund thus has a synthetic long position in the index. The swap dealer, in turn, must pay the rate of return on the index to the pension fund, and purchases commodity futures contracts to hedge its short exposure to the index. Prior to the Dodd-Frank Act, the swap dealer might have obtained a bona fide hedge exemption for its position. This would no longer be the case.

The effect of revoking these exemptions for intermediaries may be mitigated in part by the absence of class limits in the proposed rules.[484] The

[476] *See generally* CFTC Staff Report on Commodity Swap Dealers & Index Traders with Commission Recommendations (Sep. 2008) at 13–15 (''Index Trading Report'').

[477] 7 U.S.C. 6a(c)(1).

[478] Section 1.3(z), the definition of bona fide hedging transactions and positions for excluded commodities, was revised (but retained as amended) by the vacated part 151 Rulemaking. Section 1.47 of the Commission's regulations was removed and reserved by the vacated part 151 Rulemaking. On September 28, 2012, the District Court for the District of Columbia vacated the part 151 Rulemaking with the exception of the amendments to § 150.2. 887 F. Supp. 2d 259 (D.D.C. 2012). Vacating the part 151 Rulemaking, with the exception of the amendments to § 150.2, means that as things stand now, it is as if the Commission had never adopted any part of the part 151 Rulemaking other than the amendments to § 150.2. That is, the definition of bona fide hedging transactions and positions in § 1.3(z) remains unchanged, and § 1.47 is still in effect. As discussed above, the new definition of bona fide hedging positions in proposed § 150.1 is different from the changes to § 1.3(z) adopted by the Commission in the vacated part 151 Rulemaking. *See* 76 FR 71683–84. The Commission proposes to delete § 1.47 for several reasons, as discussed above. Proposed § 150.3(e) would provide guidance for persons seeking non-enumerated hedging exemptions through filing of a petition under section 4a(a)(7) of the Act, 7 U.S.C. 6a(a)(7), replacing the current process, as discussed above, under § 1.3(z)(3) and § 1.47 of the Commission's regulations.

[479] This approach is consistent with the limited exemption to provide for transition into position limits for persons with existing § 1.47 exemptions under vacated § 151.9(d) adopted in the vacated part 151 Rulemaking. *See* 76 FR 71655–56. This limited grandfather is similarly designed to limit market disruption.

[480] Section 4a(c)(1) of the CEA authorizes the Commission to define bona fide hedging transactions or positions ''consistent with the purposes of this Act.'' 7 U.S.C. 6a(c)(1).

[481] Section 4a(c)(2)(A)(i) of the Act provides that the Commission shall define what constitutes a bona fide hedging position as a position that represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel. 7 U.S.C. 6a(c)(2)(A)(i). The proposed definition of bona fide hedging position requires that, for a position in a commodity derivative contracts in a physical contract to be a bona fide hedging position, such position must represent a substitute for transactions made or to be made or positions taken or to be taken, at a later time in a physical marketing channel. *See supra* discussion of the temporary substitute test.

[482] *See* discussion above.

[483] Index trading activities have emerged as an area of special concern to both Congress and the Commission. *See generally* the Wheat Report and the Index Trading Report. The Commission continues to consider the concerns of commenters who argue that some transactions and positions recognized before the Dodd-Frank Act as bona fide hedging may, in fact, facilitate excessive speculation. *See, e.g.,* Testimony of Michael W. Masters before the Commodity Futures Trading Commission, Aug. 5, 2009, available at *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/hearing080509_masters.pdf*; Comment Letter from Better Markets, Inc., Mar. 28, 2013, available at *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=34010&Search Text=Better%20Markets*. The speculative position limits that the Commission now proposes do not directly address these concerns as they relate to commodity index funds, commodity index speculation and passive investment in the commodity derivatives markets. The speculative position limits that the Commission proposes apply only to transactions involving one commodity or the spread between two commodities *(e.g.,* the purchase of one delivery month of one commodity against the sale of that same delivery month of a different commodity). They do not apply to diversified commodity index contracts involving more than two commodities. This means that index speculators remain unconstrained on the size of positions in diversified commodity index contracts that they can accumulate so long as they can find someone with the capacity to take the other side of their trades. These commenters assert that such contracts, which this proposal does not address, consume liquidity and damage the price discovery function of the market. *Contra* Bessembinder et al., ''Predatory or Sunshine Trading? Evidence from Crude Oil Rolls'' (working paper, 2012) available at *http://business.nd.edu/uploadedFiles/Faculty_and_Research/Finance/Finance_Seminar_Series/2012%20Fall%20Finance%20Seminar%20Series%20-%20Hank%20Bessembinder%20Paper.pdf*.

[484] In the vacated part 151 Rulemaking Proposal, the Commission proposed to create two classes of contracts for non-spot month limits: (1) Futures and options on futures contracts and (2) swaps. The proposed part 151 rule would have applied single-month and all-months-combined position limits to each class separately. The aggregate position limits across contract classes would have been in addition to the position limits within each contract class. The class limits were designed to diminish the possibility that a trader could have market power as a result of a concentration in any one submarket and to prevent a trader that had a flat net aggregate position in futures and swap from establishing extraordinarily large offsetting positions. 76 FR at 71642. In response to comments received on the proposed part 151 rule, the Commission determined to eliminate class limits from the final rule. This is because the Commission believed that comments regarding the ability of market participants to net swaps and futures positions that are economically equivalent had merit. The Commission believed that concerns regarding the potential for market abuses through the use of futures and swaps positions could be addressed adequately, for the time being, by the Commission's large trader surveillance program. The Commission stated in the vacated part 151 Rulemaking that it would closely monitor speculative positions in Referenced

absence of class limits means that market participants will be able to net economically equivalent derivatives contracts that are referenced contracts, *i.e.,* futures against swaps, outside of the spot month, which would have the effect of reducing the size of a net position, perhaps below applicable speculative limits, in the case of an intermediary who enters into multiple swap positions in individual commodities to replicate a desired commodity index exposure in lieu of executing a swap on the commodity index.[485] Netting would also permit larger speculative positions in futures alone outside of the spot month for traders who did not previously have a bona fide hedge exemption, but who have positions in swaps in the same commodity that would be netted against futures in the same commodity.[486] Declining to impose class limits might seem to be at cross-purposes with narrowing the scope of the bona fide hedging definition. However, the Commission is concerned that class limits could impair liquidity in futures or swaps, as the case may be. For example, a speculator with a large portfolio of swaps near a particular class limit would be assumed to have a strong preference for executing futures transactions in order to maintain a swaps position below the class limit. If there were many similarly situated speculators, the market for such swaps could become less liquid. The absence of class limits should decrease the possibility of illiquid markets for contracts subject to Federal speculative position limits. Economically equivalent swaps and futures contracts outside of the spot month are close substitutes for each other. The absence of class limits should allow greater integration between the swaps and futures markets for contracts subject to Federal speculative position limits, and should also provide market participants with more flexibility when both hedging and speculating.

c. Proposed Recordkeeping Requirements

Proposed § 150.3(g) specifies recordkeeping requirements for persons who claim any exemption set forth in proposed § 150.3. Persons claiming exemptions under proposed § 150.3 must maintain complete books and records concerning all details of their related cash, forward, futures, options and swap positions and transactions.[487] Furthermore, such persons must make such books and records available to the Commission upon request under proposed § 150.3(h), which would preserve the ''special call'' rule set forth in current § 150.3(e). This ''special call'' rule sets forth that any person claiming an exemption under § 150.3 must, upon request, provide to the Commission such information as specified in the call relating to the positions owned or controlled by that person; trading done pursuant to the claimed exemption; the commodity derivative contracts or cash market positions which support the claim of exemption; and the relevant business relationships supporting a claim of exemption.[488]

The proposed rules concerning detailed recordkeeping and special calls would help to ensure that any person who claims any exemption set forth in § 150.3 can demonstrate a legitimate purpose for doing so.

4. Part 19—Reports by Persons Holding Bona Fide Hedge Positions Pursuant to § 150.1 of This Chapter and by Merchants and Dealers in Cotton

i. Current Part 19

The market and large trader reporting rules are contained in parts 15 through 21 of the Commission's regulations.[489] Collectively, these reporting rules effectuate the Commission's market and financial surveillance programs by providing information concerning the size and composition of the commodity futures, options, and swaps markets, thereby permitting the Commission to monitor and enforce the speculative position limits that have been established, among other regulatory goals. The Commission's reporting rules are implemented pursuant to the authority of CEA sections 4g and 4i, among other CEA sections. Section 4g of the Act imposes reporting and recordkeeping obligations on registered entities, and obligates FCMs, introducing brokers, floor brokers, and floor traders to file such reports as the Commission may require on proprietary and customer positions executed on any board of trade.[490] Section 4i of the Act requires the filing of such reports as the Commission may require when positions equal or exceed Commission-set levels.[491]

Current part 19 of the Commission's regulations sets forth reporting requirements for persons holding or controlling reportable futures and option positions which constitute bona fide hedge positions as defined in § 1.3(z) and for merchants and dealers in cotton holding or controlling reportable positions for future delivery in cotton.[492] In the several markets with federal speculative position limits—namely those for grains, the soy complex, and cotton—hedgers that hold positions in excess of those limits must file a monthly report pursuant to part 19 on CFTC Form 204: Statement of Cash Positions in Grains,[493] which includes the soy complex, and CFTC Form 304 Report: Statement of Cash Positions in Cotton.[494] These monthly reports, collectively referred to as the Commission's ''series '04 reports,'' must show the trader's positions in the cash market and are used by the Commission to determine whether a trader has sufficient cash positions that justify futures and option positions above the speculative limits.[495]

ii. Proposed Amendments to Part 19

The Commission proposes to amend part 19 so that it conforms with the Commission's proposed changes to part

Contracts and may revisit this issue as appropriate. 76 FR 71643. The Commission has determined to omit class limits from the rules proposed in this release for the same reasons that it eliminated class limits in the vacated part 151 Rulemaking.

[485] Netting of commodity index contracts with referenced contracts would not be permitted because a commodity index contract is not a substitute for a position taken or to be taken in a physical marketing channel.

[486] For example, a swap intermediary seeking to manage price risk on its books from serving as a counterparty to swap clients in commodity index swap contracts or commodity swap contracts could establish a portfolio of long futures positions in the commodities in the index or the commodity underlying the swap above applicable speculative limits if it had obtained a risk-management exemption. If the Commission adopts this proposal, the intermediary would not be able to hedge above the limits pursuant to the exemption, but could net economically equivalent contracts, which would have the effect of reducing the size of the position below applicable speculative limits.

[487] Such positions and transactions include anticipated requirements, production and royalties, contracts for services, cash commodity products and by-products, and cross-commodity hedges.

[488] In order to capture information relating to swaps positions, the term ''futures, options'' in 17 CFR 150.3(e) would be replaced in proposed § 150.3(g) with the broader term ''commodity derivative contracts'' (defined in proposed § 150.1).

[489] 17 CFR parts 15–21.

[490] *See* CEA section 4g(a); 7 U.S.C. 6g(a).

[491] *See* CEA section 4i; 7 U.S.C. 6i.

[492] *See* 17 CFR part 19. Current part 19 cross-references a provision of the definition of reportable position in 17 CFR 15.00(p)(2). As discussed below, that provision would be incorporated into proposed § 19.00(a).

[493] Current CFTC Form 204: Statement of Cash Positions in Grains is available at *http://www.cftc.gov/ucm/groups/public/@forms/documents/file/cftcform204.pdf*.

[494] Current CFTC Form 304 Report: Statement of Cash Positions in Cotton is available at *http://www.cftc.gov/ucm/groups/public/@forms/documents/file/cftcform304.pdf*.

[495] In addition, in the cotton market, merchants and dealers file a weekly CFTC Form 304 Report of their unfixed-price cash positions, which is used to publish a weekly Cotton On-call report, a service to the cotton industry. The Cotton On-Call Report shows how many unfixed-price cash cotton purchases and sales are outstanding against each cotton futures month.

150. First, the Commission proposes to amend part 19 by adding new and modified cross-references to proposed part 150, including the new definition of bona fide hedging position in proposed § 150.1. Second, the Commission proposes to amend § 19.00(a) by extending reporting requirements to any person claiming any exemption from federal position limits pursuant to proposed § 150.3. The Commission proposes to add three new series '04 reporting forms to effectuate these additional reporting requirements. Third, the Commission proposes to update the manner of part 19 reporting. Lastly, the Commission proposes to update both the type of data that would be required in series '04 reports, as well as the time allotted for filing such reports.

For purposes of clarity and simplicity, the Commission seeks to retain the current organization of grouping many reporting requirements, including those related to claimed exemptions from the federal position limits, within parts 15–21 of the Commission's regulations. The Commission notes this is a change from the organization of vacated § 151.5, which included both exemptions and related reporting requirements within a single section.

a. Amended Cross-References

As discussed above, the Commission has proposed to replace the definition of bona fide hedging transaction found in § 1.3(z) with a new proposed definition of bona fide hedging position in proposed § 150.1. Therefore, proposed part 19 would replace cross-references to § 1.3(z) with cross-references to the new definition of bona fide hedging positions in proposed § 150.1.

Proposed part 19 will be expanded to include reporting requirements for positions in swaps, in addition to futures and options positions, for any part of which a person relies on an exemption. Therefore, positions in ''commodity derivative contracts,'' as defined in proposed § 150.1, would replace ''futures and option positions'' throughout amended part 19 as shorthand for any futures, option, or swap contract in a commodity (other than a security futures product as defined in CEA section 1a(45)).[496] This amendment would harmonize the reporting requirements of part 19 with proposed amendments to part 150 that encompass swap transactions.

Proposed § 19.00(a) would eliminate the cross-reference to the definition of reportable position in § 15.00(p)(2). In this regard, the current reportable position definition essentially identifies futures and option positions in excess of speculative position limits. Proposed § 19.00(a) simply makes clear that the reporting requirement applies to commodity derivative contract positions (including swaps) that exceed speculative position limits, as discussed below.

b. List of Persons Who Must File Series '04 Reports Extended To Include Any Person Claiming an Exemption Under Proposed § 150.3

The reporting requirements of current part 19 apply only to persons holding bona fide hedge positions and merchants and dealers in cotton holding or controlling reportable positions for future delivery in cotton.[497] The Commission proposes to extend the reach of part 19 by requiring all persons who wish to avail themselves of any exemption from federal position limits under proposed § 150.3 to file applicable series '04 reports.[498] Collection of this information would facilitate the Commission's surveillance program with respect to detecting and deterring trading activity that may tend to cause sudden or unreasonable fluctuations or unwarranted changes in the prices of the referenced contracts and their underlying commodities. By broadening the scope of persons who must file series '04 reports, the Commission seeks to ensure that any person who claims any exemption from federal speculative position limits can demonstrate a legitimate purpose for doing so. The list of positions set forth in proposed § 150.3 that are eligible for exemption from the federal position includes, but is not limited to, bona fide hedging positions (including pass-through swaps and anticipatory bona fide hedge positions), qualifying spot month positions in cash-settled referenced contracts, and qualifying non-enumerated risk-reducing transactions.

Series '04 reports currently refers to Form 204 and Form 304, which are listed in current § 15.02.[499] The Commission proposes to add three new series '04 reporting forms to effectuate the expanded reporting requirements of part 19. The Commission will avoid using any form numbers with ''404'' to avoid confusion with the part 151 Rulemaking.[500] Proposed Form 504 would be added for use by persons claiming the conditional spot month limit exemption pursuant to proposed § 150.3(c).[501] Proposed Form 604 would be added for use by persons claiming a bona fide hedge exemption for either of two specific pass-through swap position types, as discussed further below.[502] Proposed Form 704 would be added for use by persons claiming a bona fide hedge exemption for certain anticipatory bona fide hedging positions.[503]

c. Manner of Reporting

(1) Excluding Certain Source Commodities, Products or Byproducts of the Cash Commodity Hedged

For purposes of reporting cash market positions under current part 19, the Commission historically has allowed a reporting trader to ''exclude certain products or byproducts in determining his cash positions for bona fide hedging'' if it is ''the regular business practice of the reporting trader'' to do so.[504] The Commission has determined to clarify the meaning of ''economically appropriate'' in light of this reporting exclusion of certain cash positions.[505] In order for a position to be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, the enterprise generally should take into account all inventory or products that the enterprise owns or controls, or has contracted for purchase or sale at a fixed price. For example, in line with its historical approach to the reporting exclusion, the Commission does not believe that it would be economically appropriate to exclude large quantities of a source commodity held in inventory when an enterprise is calculating its value at risk to a source commodity and it intends to establish a long derivatives position as

[496] *See* discussion above.

[497] *See* 17 CFR part 19. Current part 19 cross-references the definition of reportable position in 17 CFR 15.00(p).

[498] Furthermore, anyone exceeding the federal limits who has received a special call must file a series '04 form.

[499] 17 CFR 15.02.

[500] Forms 404, 404A and 404S were required under provisions of vacated part 151.

[501] *See supra* discussion of proposed § 150.3(c).

[502] Proposed Form 604 would replace Form 404S (as contemplated in vacated part 151).

[503] The updated definition of bona fide hedging in proposed § 150.1 incorporates several specific types of anticipatory transactions: unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated services contract payments or receipts, and anticipatory cross-commodity hedges. *See,* paragraphs (3)(iii), (4)(i), (iii), and (iv), and (5), respectively, of the Commission's amended definition of bona fide hedging transactions in proposed § 150.1 as discussed *above.*

[504] *See* 17 CFR 19.00(b)(1) (providing that ''[i]f the regular business practice of the reporting trader is to exclude certain products or byproducts in determining his cash position for bona fide hedging . . ., the same shall be excluded in the report'').

[505] *See supra* discussion of the ''economically appropriate test'' as it relates to the definition of bona fide hedging position.

a hedge of unfilled anticipated requirements. Therefore, under proposed § 19.00(b)(1), a source commodity itself can only be excluded from a calculation of a cash position if the amount is de minimis, impractical to account for, and/or on the opposite side of the market from the market participant's hedging position.[506]

Originally, the Commission intended for the optional part 19 reporting exclusion to cover only cash positions that were not capable of being delivered under the terms of any derivative contract.[507] The Commission differentiated between ''products and byproducts'' of a commodity and the underlying commodity itself, the former capable of exclusion from part 19 reporting under normal business practices due to the absence of any derivative contract in such product or byproduct.[508] This intention ultimately evolved to allow cross-commodity hedging of products and byproducts of a commodity that were not necessarily deliverable under the terms of any derivative contract.[509] The instructions to current Form 204 go a step further than current § 19.00(b)(1) by allowing for a reporting trader to exclude ''certain source commodities, products, or byproducts in determining [ ] cash positions for bona fide hedging.'' (Emphasis added.)

The Commission's proposed clarification of the § 19.00(b)(1) reporting exclusion would prevent the definition of bona fide hedging positions in proposed § 150.1 from being swallowed by this reporting rule. For it would not be economically appropriate behavior for a person who is, for example, long derivative contracts to exclude inventory when calculating unfilled anticipated requirements. Such behavior would call into question whether an offset to unfilled anticipated requirements is, in fact, a bona fide hedging position, since such inventory would fill the requirement. As such, a trader can only underreport cash market activities on the opposite side of the market from her hedging position as a regular business practice, unless the unreported inventory position is de minimis or impractical to account for. By way of example, the alternative manner of reporting in proposed § 19.00(b)(1) would permit a person who has a cash inventory of 5 million bushels of wheat, and is short 5 million bushels worth of commodity derivative contracts, to underreport additional cash inventories held in small silos in disparate locations that are administratively difficult to count. This person could instead opt to calculate and report these hard-to-count inventories and establish additional short positions in commodity derivative contracts as a bona fide hedge against such additional inventories.

(2) Cross-Commodity Hedges

Proposed § 19.00(b)(2) sets forth instructions, which are consistent with the provisions in the current section, for reporting a cash position in a commodity that is different from the commodity underlying the futures contract used for hedging.[510] A person who is unsure of whether a commodity may serve as the basis of a cross-commodity hedge should refer to the deliverable commodities listed by the relevant DCM under the terms of a particular core referenced futures contract. Persons who wish to avail themselves of cross-commodity hedges are required to file an appropriate series '04 form.[511]

Under vacated § 151.5(g), traders engaged in hedging commercial activity (or hedging swaps that in turn hedge commercial activity) that did not involve the same quantity or commodity as the quantity or commodity associated with positions in referenced contracts that are used to hedge would have been obligated to submit a description of the conversion methodology each time they cross-hedged.[512] In lieu of that, the Commission proposes to instead maintain the special call status concerning such information as set forth in current § 19.00(b)(3).[513] Furthermore, since proposed § 19.00(b)(3) would maintain the requirement that cross-hedged positions be shown both in terms of the equivalent amount of the commodity underlying the commodity derivative contract used for hedging and in terms of the actual cash commodity (as provided for on the appropriate series '04 form), the Commission will be able to determine the hedge ratio used merely by comparing the reported positions. Thus, the Commission will be positioned to review whether a hedge ratio appears reasonable in comparison to, for example, other similarly situated traders, without requiring reporting of the conversion methodology.

(3) Standards and Conversion Factors

Proposed § 19.00(b)(3) maintains the requirement that standards and conversion factors used in computing cash positions for reporting purposes must be made available to the Commission upon request. Proposed § 19.00(b)(3) would clarify that such information would include hedge ratios used to convert the actual cash commodity to the equivalent amount of the commodity underlying the commodity derivative contract used for hedging, and an explanation of the methodology used for determining the hedge ratio.

(4) Examples of Completed '04 Forms

To assist filers in completing Forms 204, 304, 504, 604 and 704, illustrative examples are provided in appendix A to part 19, adjacent to the blank forms and instructions. Once finalized, filers would be able to contact Commission staff in the Office of Data and Technology (ODT) and/or surveillance staff in the Division of Market Oversight for additional guidance.

d. Information Required and Timing

Proposed § 19.01(b)(3) would require series '04 reports to be transmitted using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission or its designee.[514]

[506] Proposed § 19.00(b)(1) adds a caveat to the alternative manner of reporting: when reporting for the cash commodity of soybeans, soybean oil, or soybean meal, the reporting person shall show the cash positions of soybeans, soybean oil and soybean meal. This proposed provision for the soybean complex is included in the current instructions for preparing Form 204.

[507] 43 FR 45825, 45827, Oct. 4, 1978 (explaining that the allowance for eggs not kept in cold storage to be excluded from reporting a cash position in eggs under part 19 ''was appropriate when the only futures contract being traded in fresh shell eggs required delivery from cold storage warehouses.'').

[508] Prior to the Commission revising the part 19 reporting exclusion for eggs, *see id.,* the exclusion allowed ''eggs not in cold storage or certain egg products'' not to be reported as a cash position. 26 FR 2971, Apr. 7, 1961 (emphasis added). Additionally, the title to the revised exclusion reads: ''Excluding products or byproducts of the cash commodity hedged.'' *See* 43 FR 45825, 45828, Oct. 4, 1978. So, in addition to a commodity itself that was not deliverable under any derivative contract, the Commission also recognized a separate class of ''products and byproducts'' that resulted from the processing of a commodity that it did not believe at the time was capable of being hedged by any derivative contract for purposes of a bona fide hedge.

[509] *See* 42 FR 42748, Aug. 24, 1977. Cross-commodity hedging is discussed as an enumerated hedge, below.

[510] Proposed § 19.00(b)(2) would add the term commodity derivative contracts (as defined in proposed § 150.1). The proposed definition of cross-commodity hedge in proposed § 150.1 is discussed *above.*

[511] Vacated § 151.5(g) would have required the filing of a Form 404, 404A, or 404S by persons availing themselves of cross-commodity hedges.

[512] *See* 76 FR at 71692.

[513] *See* discussion below.

[514] For example, the Commission is considering requiring that series '04 reports should be sent to the Commission via FTP, unless otherwise specifically authorized by the Commission or its designee. Prior to submitting series '04 reports, persons would contact the CFTC at (312) 596–0700 to obtain the CFTC trader identification code required by such reports. Further instructions on

Continued

(1) Bona Fide Hedgers and Cotton Merchants and Dealers

Current § 19.01(a) sets forth the data that must be provided by bona fide hedgers (on Form 204) and by merchants and dealers in cotton (on Form 304).[515] The Commission proposes to continue using Forms 204 and 304, which will feature only minor changes to the types of data to be reported.[516] To accommodate open price pairs, proposed § 19.01(a)(3) would remove the modifier ''fixed price'' from ''fixed price cash position'' and would add a specific request for data concerning open price contracts. The Commission would maintain additional reporting requirements for cotton but will incorporate the monthly reporting, including the granularity of equity, certificated and non-certificated cotton stocks, on Form 204. Weekly reporting for cotton will be retained as a separate report made on Form 304 for the collection of data required by the Commission to publish its weekly public cotton ''on call'' report on *www.cftc.gov*.

Proposed § 19.01(b) would maintain the requirement that reports on Form 204 be submitted to the Commission on a monthly basis, as of the close of business on the last Friday of the month.[517] Accordingly, commercial firms would measure their respective cash positions on one day a month, as they currently do for Form 204, and submit a monthly report, as currently provided in § 19.01. Proposed § 19.02 provides that Form 304, but not Form 204, must be filed weekly to provide data for the Commission's weekly cotton ''on call'' report. The Commission would continue to utilize its special call authority in addition to the regular reporting on '04 forms to ensure that it has sufficient information.

(2) Conditional Spot-Month Limit Exemption

Proposed § 19.01(a)(1) would require persons availing themselves of the conditional spot month limit exemption (pursuant to proposed § 150.3(c)) to report certain detailed information concerning their cash market activities for any commodity specially designated by the Commission for reporting under § 19.03 of this part. While traders who avail themselves of this exemption could not directly influence particular settlement prices by trading in the physical-delivery referenced contract, the Commission remains concerned about such traders' activities in the underlying cash commodity. Accordingly, proposed § 19.01(b) would require that persons claiming a conditional spot month limit exemption must report on new Form 504 daily, by 9 a.m. Eastern Time on the next business day, for each day that a person is over the spot month limit in certain special commodity contracts specified by the Commission.[518] The scope of reporting—purchase and sales contracts through the delivery area for the core referenced futures contract and inventory in the delivery area—differs from the scope of reporting for bona fide hedgers, since the person relying on the conditional spot month limit exemption may not be hedging any position.

Initially, the Commission would require reporting on new Form 504 for conditional spot month limit exemptions in the natural gas commodity derivative contracts only. Based on its experience in surveillance of natural gas commodity derivative contracts, the Commission believes that enhanced reporting is warranted.[519] The Commission would wait to impose similar reporting requirements for persons claiming conditional spot month limit exemptions in other commodity derivative contracts until the Commission gains additional experience with the limits in proposed § 150.2. In this regard, the Commission will closely monitor the reporting associated with conditional spot month limit exemptions in natural gas and may require reporting on Form 504 for other commodity derivative contracts in the future in response to market developments and to facilitate surveillance.[520]

(3) Pass-Through Swap Exemption

Under the definition of bona fide hedging position in proposed § 150.1, a person who uses a swap to reduce risks attendant to a position that qualifies as a bona fide hedging position may pass-through those bona fides to the counterparty, even if the person's swap position is not in excess of a position limit.[521] As such, positions in commodity derivative contracts that reduce the risk of pass-through swaps would qualify as bona fide hedging positions.

Proposed § 19.01(a)(2) would require a person relying on the pass-through swap exemption who holds either of two position types to file a report with the Commission on new Form 604. The first type of position is a swap executed opposite a bona fide hedger that is not a referenced contract and for which the risk is offset with referenced contracts. The second type of position is a cash-settled swap executed opposite a bona fide hedger that is offset with physical-delivery referenced contracts held into a spot month, or, vice versa, a physical-delivery swap executed opposite a bona fide hedger that is offset with cash-settled referenced contracts held into a spot month.

These reports on Form 604 would explain hedgers' needs for large referenced contract positions and would give the Commission the ability to verify the positions were a bona fide hedge, with heightened daily surveillance of spot month offsets. Persons holding any type of pass-through swap position other than the two described above would report on Form 204.[522]

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submitting '04 reports may be found at *http://www.cftc.gov/Forms/index.htm*. If submission through FTP is impractical, the reporting trader would contact the Commission at (312) 596–0700 for further instruction.

CFTC Form 204 reports with respect to transactions in wheat, corn, oats, soybeans, soybean meal and soybean oil would no longer be sent to the Commission's office in Chicago, IL.

Similarly, CFTC Form 304 reports with respect to transactions in cotton would no longer be sent to the Commission's office in New York, NY.

[515] Vacated § 151.5 would have set forth the application procedure for bona fide hedgers and counterparties to bona fide hedging swap transactions that seek an exemption from the Commission-set Federal position limits for Referenced Contracts. Under vacated § 151.5, had a bona fide hedger sought to claim an exemption from position limits because of cash market activities, then the hedger would have submitted a Form 404 filing pursuant to vacated § 151.5(b). The Form 404 filing would have been submitted when the bona fide hedger exceeded the applicable position limit and claimed an exemption or when its hedging needs increased. Similarly, parties to bona fide hedging swap transactions would have been required to submit a Form 404S filing to qualify for a hedging exemption, which would also have been submitted when the bona fide hedger exceeded the applicable position limit and claimed an exemption or when its hedging needs increased.

[516] The list of data required for persons filing on Forms 204 and 304 would be relocated from current § 19.01(a) to proposed § 19.01(a)(3).

[517] *Compare* proposed § 19.01(b) with 17 CFR 19.01(b). Additionally, *compare* proposed § 19.01(b) with vacated § 151.5(c) which would have required that any person holding a derivatives position in excess of a position limit record and ultimately report information about such person's cash positions in the relevant commodity for *each* day that its derivatives position exceeds the applicable position limit.

[518] Additionally, data under this provision may be required by way of special call, in addition to special commodity reporting.

[519] The Commission has observed dramatic instances of disruptive trading practices in the natural gas markets. *See United States CFTC* v. *Amaranth Advisors,* LLC, 2009 U.S. Dist. LEXIS 101406 (S.D.N.Y. Aug. 12, 2009). The Commission endeavors to balance the cost of similar enhanced reporting for the other 27 commodities against its experience with observing disruptive trading practices.

[520] *See* proposed § 19.03.

[521] *See supra* discussion of the proposed definition of bona fide hedging position.

[522] Persons holding pass-through swap positions that are offset with referenced contracts outside the spot month (whether such contracts are for physical delivery or are cash-settled) need not report on

(A) Non-Referenced Contract Swap Offset

Proposed § 19.01(a)(2)(i) lists the types of data that a person who executes a pass-through swap that is not a referenced contract and for which the risk is offset with referenced contracts must report on new Form 604. Such data requirements include details concerning the non-referenced contract in terms of commodity reference price,[523] notional quantity, gross long or short position in terms of futures-equivalents in the core referenced futures contract, and gross long or short position in the referenced contract used to offset risk.[524] Under proposed § 19.01(b), persons holding a non-referenced contract swap offset would submit reports to the Commission on a monthly basis, as of the close of business of the last Friday of the month. This data collection would permit staff to identify offsets of non-referenced-contract pass-through swaps on an ongoing basis for further analysis. The Commission believes collection of this data will be less burdensome on reporting entities than complying with special calls.

(B) Spot Month Swap Offset

Under proposed § 150.2(a), a trader in the spot month may not net across physical-delivery and cash-settled contracts for the purpose of complying with federal position limits.[525] If a person executes a cash-settled pass-through swap that is offset with physical-delivery contracts held into a spot month (or vice versa), then, pursuant to proposed § 19.01(a)(2)(ii), that person must report additional information concerning the swap and offsetting referenced contract position on new Form 604. A person need not file a Form 604 if he or she executes a cash-settled pass-through swap that is offset with cash-settled referenced contracts, or, vice versa, a physical delivery pass-through swap offset with physical delivery referenced contracts.[526] Pursuant to proposed § 19.01(b), a person holding a spot month swap offset would need to file on Form 604 as of the close of business on each day during a spot month, and not later than 9 a.m. Eastern Time on the next business day following the date of the report. The Commission notes that pass-through swap offsets would not be permitted during the lesser of the last five days of trading or the time period for the spot month. However, the Commission remains concerned that a trader could hold an extraordinarily large position early in the spot month in the physical-delivery contract along with an offsetting short position in a cash-settled contract, which may disrupt the price discovery function of the underlying physical delivery core referenced futures contract. Hence, the Commission proposes to introduce this new daily reporting requirement within the spot month to identify and monitor such offsetting positions.

5. Section 150.7—Reporting Requirements for Anticipatory Hedging Positions

For reasons discussed above, the revised definition of bona fide hedging in proposed § 150.1 incorporates hedges of five specific types of anticipated transactions: unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated services contract payments or receipts, and anticipatory cross-hedges.[527] The Commission proposes reporting requirements in new § 150.7 for traders seeking an exemption from position limits for any of these five enumerated anticipated hedging transactions. Proposed § 150.7 would build on, and replace, the special reporting requirements for hedging of unsold anticipated production and unfilled anticipated requirements in current § 1.48.[528]

i. Current § 1.48

Current § 1.48 provides a procedure for persons to file for bona fide hedging exemptions for anticipated production or unfilled requirements when that person has not covered the anticipatory need with fixed-price commitments to sell a commodity, or inventory or fixed-price commitments to purchase a commodity. The Commission has long been concerned that distinguishing between what is the reduction of risk arising from anticipatory needs, and what is speculation, may be exceedingly difficult if anticipatory transactions are not well defined. Therefore, for more than fifty years, the position limit rules have set discrete reporting requirements in § 1.48 for persons wishing to avail themselves of certain anticipatory bona fide hedging position exemptions.[529] When first promulgated in 1956, § 1.48 set forth reporting requirements for persons hedging anticipated requirements for processing or manufacturing.[530] In 1977, § 1.48 was amended to include similar reporting requirements for a second type of anticipatory hedge transaction: unsold anticipated production.[531] Thereafter, the Commission did not substantively amend § 1.48 until it adopted a new position limits regime in 2011.[532]

In January 2011, the Commission published a notice of proposed rulemaking to replace existing part 150, in its entirety, with a new federal position limits rules regime in the form of new part 151.[533] Proposed § 151.5 would have established exemptions from position limits for bona fide hedging transactions or positions in exempt and agricultural commodities.[534] The referenced contracts subject to the proposed position limit framework would have been subject to the bona fide hedge provisions of proposed § 151.5 and would have no longer been subject to the definition of bona fide hedging transactions in § 1.3(z), which would have been retained only for excluded commodities.[535] Proposed § 151.5(c) specified reporting and approval requirements for traders seeking an anticipatory hedge exemption, incorporating the current requirements of § 1.48 (and thereby rendering § 1.48

Form 604 because swap positions will be netted with referenced contract positions outside the spot month pursuant to proposed § 150.2(b).

[523] As defined in 17 CFR 20.1, a commodity reference price is the price series used by the parties to a swap or swaption to determine payments made, exchanged, or accrued under the terms of that swap or swaption.''

[524] In contrast to vacated § 151.5(f) and (g), proposed § 19.01(a)(2)(i) would not require the person to submit a description of the conversion methodology each time he or she cross-hedged.

[525] *See supra* discussion of proposed § 150.2(a).

[526] To provide clarity in filings, a person may report cash-settled referenced contracts used for bona fide hedging in a separate filing from physical-delivery referenced contracts used for bona fide hedging.

[527] *See* paragraphs (3)(iii), (4)(i), (iii), and (iv), and (5), respectively, of the Commission's amended definition of bona fide hedging transactions in proposed § 150.1 as discussed *above.*

[528] *See* 17 CFR 1.48. *See also* definition of bona fide hedging transactions in current 17 CFR 1.3(z)(2)(i)(B) and (ii)(C), respectively.

[529] *See* Hedging Anticipated Requirements for Processing or Manufacturing under Section 4a(3) of the Commodity Exchange Act, 21 FR 6913, Sep. 12, 1956.

[530] *Id.* The statutory definition also provided an anticipatory production hedge for twelve months agricultural production. 7 U.S.C. 6a(3)(A) (1940) (1970). The statutory definition was deleted in 1974, as discussed above in the definition of bona fide hedging position.

[531] *See* Definition of Bona Fide Hedging Requirements and Related Reporting Requirements, 42 FR 42748, Aug. 24, 1977. The Commission stated at that time that this amended reporting requirement was intended to conform § 1.48 to the updated definition of bona fide hedging in § 1.3(z), and to limit the potential for market disruption. *Id.* at 42750.

[532] *See generally* 76 FR 71626, November 18, 2011. Prior to compliance dates, the rule was vacated, as discussed below.

[533] Proposed Rule, 76 FR 4752, Jan. 26, 2011. The final rulemaking for new Part 151 required DCMs to comply with Part 150 until such time that the Commission replaces Part 150 with the new Part 151. *See* 76 FR 71632.

[534] 76 FR 71643.

[535] 76 FR 71644.

duplicative).[536] However, in an Order dated September 28, 2012, the United States District Court for the District of Columbia vacated part 151.[537] The District Court decision had the effect of reinstating §§ 1.3(z) and 1.48.[538] Therefore, §§ 1.3(z) and 1.48 continue to apply as if part 151 had not been finally adopted by the Commission.

ii. Proposed § 150.7

a. Reporting Requirements for Anticipatory Hedging Positions

The Commission's revised definition of bona fide hedging in proposed § 150.1 would enumerate two new types of anticipatory bona hedging positions. Two existing types of anticipatory hedges would be carried forward from the existing definition of bona fide hedging in current § 1.3(z): hedges of unfilled anticipated requirements and hedges of unsold anticipated production, as well as anticipatory cross-commodity hedges of such requirements or production.[539] Proposed § 150.1 would expand the list of enumerated anticipatory bona fide hedging positions to include hedges of anticipated royalties and hedges of anticipated services contract payments or receipts, as well as anticipatory cross-commodity hedges of such contracts.[540] As discussed above, § 1.48 has long required special reporting for hedges of unfilled anticipated requirements and hedges of unsold anticipated production because the Commission remains concerned about distinguishing between anticipatory reduction of risk and speculation. Such concerns apply equally to any position undertaken to reduce the risk of anticipated transactions. Hence, the Commission proposes to extend the special reporting requirements in proposed § 150.7 for all types of enumerated anticipatory hedges that appear in the definition of bona fide hedging positions in proposed § 150.1.

For purposes of simplicity, the proposed special reporting requirements for anticipatory hedges would be placed within the Commission's position limits regime in part 150, and alongside the Commission's updated definition of bona fide hedging positions in proposed § 150.1. Thus, the Commission is proposing to delete the reporting requirements for anticipatory hedges in current § 1.48 because that section is duplicative.

b. New Form 704

The Commission proposes to add a new series '04 reporting form, Form 704, to effectuate these additional and updated reporting requirements for anticipatory hedges. Persons wishing to avail themselves of an exemption for any of the anticipatory hedging transactions enumerated in the updated definition of bona fide hedging in proposed § 150.1 would be required to file an initial statement on Form 704 with the Commission at least ten days in advance of the date that such positions would be in excess of limits established in proposed § 150.2. Advance notice of a trader's intended maximum position in commodity derivative contracts to offset anticipatory risks would allow the Commission to review a proposed position before a trader exceeds the position limits and, thereby, would allow the Commission to prevent excessive speculation in the event that a trader were to misconstrue the purpose of these limited exemptions.[541] The trader's initial statement on Form 704 would provide a detailed description of the person's anticipated activity (i.e., unfilled anticipated requirements, unsold anticipated production, etc.).[542] Under proposed § 150.7(b), the Commission may reject all or a portion of the position as not meeting the requirements for bona fide hedging positions under proposed § 150.1. To support this determination, proposed § 150.7(c) would allow the Commission to request additional specific information concerning the anticipated transaction to be hedged. Otherwise, Form 704 filings that conform to the requirements set forth in proposed § 150.7 would become effective ten days after submission. Proposed § 150.7(e) would require an anticipatory hedger to file a supplemental report on Form 704 whenever the anticipatory hedging needs increase beyond that in its most recent filing.

c. Annual and Monthly Reporting Requirements

Proposed § 150.7(f) would add a requirement for any person who files an initial statement on Form 704 to provide annual updates that detail the person's actual cash market activities related to the anticipated exemption. With an eye towards distinguishing bona fide hedging of anticipatory risks from speculation, annual reporting of actual cash market activities and estimates of remaining unused anticipated exemptions beyond the past year would enable the Commission to verify whether the person's anticipated cash market transactions closely track that person's real cash market activities. Proposed § 150.7(g) would similarly enable the Commission to review and compare the actual cash activities and the remaining unused anticipated hedge transactions by requiring monthly reporting on Form 204. Absent monthly filing, the Commission would need to issue a special call to determine why a person's commodity derivative contract position is, for example, larger than the pro rata balance of her annually reported anticipated production.

As is the case under current § 1.48, proposed § 150.7(h) requires that a trader's maximum sales and purchases must not exceed the lesser of the approved exemption amount or the trader's current actual anticipated transaction.

d. Delegation

The Commission is proposing to delete current § 140.97, which delegates to the Director of the Division of Market Oversight or his designee authority regarding requests for classification of positions as bona fide hedging under current §§ 1.47 and 1.48. For purposes of simplicity, this delegation of authority would be placed in proposed § 150.7(j), within the Commission's position limits regime in part 150.

6. Miscellaneous Regulatory Amendments

i. Proposed § 150.6—Ongoing Application of the Act and Commission Regulations

The Commission is proposing to amend existing § 150.6 to conform the provision with the general applicability of part 150 to SEFs that are trading facilities, and concurrently making non-substantive changes to clarify the provision. The provision, as amended and clarified, provides this part shall only be construed as having an effect on

[536] *Id.* This rulemaking would have removed and reserved § 1.48.

[537] *See* 887 F. Supp. 2d 259 (D.D.C. 2012).

[538] *See Georgetown Univ. Hosp.* v. *Bowen,* 821 F.2d 750, 757 (D.C. Cir. 1987) ("This circuit has previously held that the effect of invalidating an agency rule is to 'reinstate the rules previously in force.' ").

[539] *See* current definition of bona fide hedging transactions at 17 CFR 1.3(z)(2)(i)(B) and (ii)(C), respectively. Cross-commodity hedges are permitted under 17 CFR 1.3(z)(2)(iv). *Compare with* paragraphs (3)(iii) and (4)(i), respectively, of the definition of bona fide hedging positions in proposed § 150.1, discussed *above.*

[540] *See* sections (4)(iii) and (iv) and (5), respectively, of the definition of bona fide hedging positions in proposed § 150.1, discussed *above.*

[541] Further, advance filing may serve to reduce the burden on a person who exceeds position limits and who may then otherwise be issued a special call to determine whether the underlying requirements for the exemption have been met. If the Commission were to reject such an exemption, such a person would have already violated position limits.

[542] Proposed 150.7(d)(2) would require additional information for cross hedges, for reasons discussed above.

position limits and that nothing in part 150 shall affect any provision promulgated under the Act or Commission regulations including but not limited to those relating to manipulation, attempted manipulation, corners, squeezes, fraudulent or deceptive conduct, or prohibited transactions.[543] For example, by requiring DCMs and SEFs that are trading facilities to impose and enforce exchange-set speculative position limits, the Commission does not intend for the fulfillment of such requirements alone to satisfy any other legal obligations under the Act and Commission regulations of DCMs and SEFs that are trading facilities to detect and deter market manipulation and corners. In another example, a market participant's compliance with position limits or an exemption does not confer any type of safe harbor or good faith defense to a claim that he had engaged in an attempted manipulation, a perfected manipulation or deceptive conduct.

ii. Proposed § 150.8—Severability

The Commission is proposing to add § 150.8 to address the severability of individual provisions of part 150. Should any provision(s) of part 150 be declared invalid, including the application thereof to any person or circumstance, § 150.8 provides that all remaining provisions of part 150 shall not be affected to the extent that such remaining provisions, or the application thereof, can be given effect without the invalid provisions.[544] The Commission believes it is prudent to include a severability clause to avoid any further delay, as practicable, in carrying out Congress' mandate to impose position limits in a timely manner.

iii. Part 15—Reports—General Provisions

The Commission is proposing to amend the definition of the term ''reportable position'' in current § 15.00(p)(2) by clarifying that: (1) Such positions include swaps; (2) issued and stopped positions are not included in open interest against a position limit; and (3) special calls may be made for any day a person exceeds a limit. Additionally, the Commission is proposing to amend § 15.01(d) by adding language to reference swaps positions. Lastly, the Commission is proposing to amend the list of reporting forms in current § 15.02 to account for new and updated series '04 reporting forms, as discussed above.[545]

iv. Part 17—Reports by Reporting Markets, Futures Commission Merchants, Clearing Members, and Foreign Brokers

The Commission is proposing to amend current § 17.00(b) to delete aggregation provisions, since those provisions are duplicative of aggregation provisions in § 150.4.[546] Proposed § 17.00(b) would provide that ''[e]xcept as otherwise instructed by the Commission or its designee and as specifically provided in § 150.4 of this chapter, if any person holds or has a financial interest in or controls more than one account, all such accounts shall be considered by the futures commission merchant, clearing member or foreign broker as a single account for the purpose of determining special account status and for reporting purposes.'' In addition, proposed § 17.03(h) would delegate to the Director of the Division of Market Oversight or his designee the authority to instruct persons pursuant to proposed § 17.03.[547]

II. Revision of Rules, Guidance, and Acceptable Practices Applicable to Exchange-Set Speculative Position Limits—§ 150.5

A. Background

Pursuant to 17 CFR part 150, the Commission administers speculative position limits on futures contracts for certain agricultural commodities.[548] Prior to the CEA's amendment in 1974, which expanded its jurisdiction to all ''services, rights and interests'' in which futures contracts are traded, only certain designated agricultural commodities could be regulated. Both prior to and after the 1974 amendments to the Act, futures markets that traded commodities not so enumerated applied speculative position limits by exchange rule, if at all. In 1981, the Commission promulgated § 1.61, which required that, absent an exemption, exchanges must adopt and enforce speculative position limits for all contracts that are not subject to the Commission-set limits.[549] The Commission has periodically reviewed and updated its policies and rules pertaining to each of the three basic elements of the regulatory framework for speculative position limits, namely, the levels of the limits, the exemptions from them (in particular, for hedgers), and the policy on aggregating accounts.[550]

In 1999, the Commission relocated several of the rules and policies concerning exchange-set-position limits from § 1.61 to current § 150.5, thereby incorporating within part 150 most Commission rules relating to speculative position limits. The Commission codified as rules within § 150.5 various staff policies and administrative practices that had developed over time. These policies and practices related to the speculative position limit levels that the staff had routinely recommended for approval by the Commission for newly designated futures and option contracts, as well as the magnitude of increases to the limit levels that it would approve for already-traded contracts. The Commission also codified within § 150.5 various exemptions from the general requirement that exchanges must set speculative position limits for all contracts. The exemptions included permitting exchanges to substitute position accountability rules for position limits for physical commodity derivatives outside the spot month in high volume and liquid markets.[551]

Less than two years after the Commission promulgated § 150.5, the Commodity Futures Modernization Act

[543] The Commission notes that amended § 150.6 matches vacated § 151.11(h).

[544] The Commission notes that proposed § 150.8 matches vacated § 151.13.

[545] *See* discussion of new and amended series '04 reports above.

[546] In a separate proposal approved on the same date as this proposal, the Commission is proposing amendments to § 150.4—aggregation of positions. *See* Aggregation NPRM (Nov. 5, 2013).

[547] In a separate final rulemaking (Oct. 30, 2013), the Commission adopted amendments to § 17.03; the current proposal would amend § 17.03 further by adding proposed § 17.03(h).

[548] *See* 17 CFR Part 150.

[549] *See* Establishment of Speculative Position Limits, 46 FR 50938, Oct. 16, 1981, and 17 CFR 1.61 (removed and reserved May 5, 1999). Section 1.61 permitted exchanges to adopt and enforce their own speculative position limits for those contracts that were covered by Commission-set speculative position limits, as long as the exchange limits were not higher than those set by the Commission. Furthermore, CEA section 4a(e) provides that a violation of a speculative position limit established by a Commission-approved exchange rule is also a violation of the Act. Thus, the Commission can enforce directly violations of exchange-set speculative position limits as well as those provided under Commission rules.

[550] Initially, for example, the Commission redefined ''hedging'' (*see* 42 FR 42748, Aug. 24, 1977), and raised speculative position limits in wheat (*see* 41 FR 35060, Aug. 19, 1976). Subsequently, for example, the Commission solicited public comment on, and subsequently approved, exchange requests for exemptions for futures and option contracts on certain financial instruments from the requirement specified by former § 1.61 that speculative position limits be specified for all contracts. *See* 56 FR 51687, Oct. 15, 1991.

[551] *See* 17 CFR 150.5. *See also* Revision of Federal Speculative Position Limits and Associated Rules, Final Rules, 64 FR 24038, 24040–42, May 5, 1999. As noted in the notice of proposed rulemaking for § 150.5, promulgating these policies within a single section of the Commission's rules would increase significantly their accessibility and clarify their terms. *See* 63 FR 38537, Jul. 17, 1998.

of 2000 (''CFMA'') [552] amended the CEA to include a set of core principles that DCMs must comply with at the time of application, and on an ongoing basis after designation,[553] including DCM core principle 5, which requires exchanges to adopt position limits or position accountability levels where necessary and appropriate to reduce the threat of market manipulation or congestion.[554] The CFMA further amended the CEA to provide DCMs with ''reasonable discretion'' in determining how to comply with each core principle, including core principle 5 regarding exchange-set position limits.[555] Since 2000, the Commission has continued to maintain § 150.5, but only as guidance on, and acceptable practices for, compliance with DCM core principle 5. The Commission did not amend § 150.5 following passage of the CFMA.

In 2010, the Dodd-Frank Act amended the CEA to explicitly provide that the Commission may mandate the manner in which DCMs must comply with the core principles.[556] Specifically, the Dodd-Frank Act amended DCM core principle 1 to include the condition that ''[u]nless otherwise determined by the Commission by rule or regulation,'' boards of trade shall have reasonable discretion in establishing the manner in which they comply with the core principles.[557]

Additionally, the Dodd-Frank Act amended DCM core principle 5 to require that, for any contract that is subject to a position limitation established by the Commission pursuant to CEA section 4a(a), the DCM ''shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.'' [558] Furthermore, the Dodd-Frank Act added CEA section 5h to provide a regulatory framework for Commission oversight of SEFs.[559] Under SEF core principle 6, which parallels DCM core principle 5, Congress required that SEFs adopt for each swap, as is necessary and appropriate, position limits or position accountability.[560] In addition, Congress required that, for any contract that is subject to a Federal position limit under CEA Section 4a(a), the SEF shall set its position limits at a level no higher than the position limitation established by the Commission.[561]

In view of these Dodd-Frank Act amendments, the Commission proposes several amendments to update and streamline the part 150 regulations. First, the Commission proposes new and amended clarifying definitions in § 150.1 that relate particularly to position limits. Second, the Commission proposes to amend § 150.5 to include SEFs and swaps. Third, the Commission proposes to codify rules and acceptable practices for compliance with DCM core principle 5 and SEF core principle 6 within amended § 150.5(a) for commodity derivative contracts that are subject to the federal position limits set forth in § 150.2. Lastly, the Commission proposes to codify rules and revise guidance and acceptable practices for compliance with DCM core principle 5 and SEF core principle 6 within amended § 150.5(b) for commodity derivative contracts that are not subject to the Federal position limits set forth in § 150.2.

B. The Current Regulatory Framework for Exchange-Set Position Limits

1. Section 150.5

The Commission currently sets and enforces position limits pursuant to its broad authority under CEA section 4a [562] and does so only with respect to certain enumerated agricultural products.[563] In 1981, the Commission promulgated what was then 17 CFR 1.61 (re-codified in 1999 as 17 CFR 150.5), which required that, absent an exemption, exchanges must adopt and enforce speculative position limits for all futures contracts that were not subject to Commission-set limits.[564]

The Commission's 1981 rule requiring that exchanges set position limits was a watershed in its approach to position limits. The Commission first concluded that multiple provisions of the CEA vested it with authority to direct that exchanges impose position limits.[565] The Commission explained that section 4a ''represents an express Congressional finding that excessive speculation is harmful to the market, and a finding that speculative limits are an effective prophylactic measure.'' [566] Relying on those Congressional findings, the Commission directed exchanges to impose speculative position limits on all futures contracts subject to their jurisdiction.[567]

In adopting this prophylactic approach, the Commission explained that comments it had received during the rulemaking that questioned ''the general desirability of [position] limits [were] contrary to Congressional findings in sections 3 and 4a of the Act and considerable years of Federal and contract market regulatory experience.'' [568] The Commission also explained that:

> the prevention of large and/or abrupt price movements which are attributable to extraordinarily large speculative positions is a Congressionally endorsed regulatory objective of the Commission. Further . . . this objective is enhanced by speculative position limits since it appears that the capacity of any contract market to absorb the establishment and liquidation of large speculative positions in an orderly manner is related to the relative size of the positions,

[552] Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (Dec. 21, 2000). By enacting the CFMA, Congress intended ''[t]o reauthorize and amend the Commodity Exchange Act to promote legal certainty, enhance competition, and reduce systemic risk in markets for futures and over-the-counter derivatives . . . .'' *Id.*

[553] *See* CEA section 5(d); 7 U.S.C. 7(d). The CEA, as amended by the CFMA, required a DCM applicant to demonstrate its ability to comply with 18 core principles.

[554] CEA section 5(d)(5); 7 U.S.C. 7(d)(5).

[555] DCM core principle 1 states, among other things, that boards of trade ''shall have reasonable discretion in establishing the manner in which they comply with the core principles.'' This ''reasonable discretion'' provision underpinned the Commission's use of core principle guidance and acceptable practices. *See* former CEA section 5(d)(1)(amended in 2010); U.S.C. 7(d)(1). As discussed *above,* the Dodd-Frank Act subsequently amended DCM core principle 1 to specifically provide the Commission with discretion to determine, by rule or regulation, the manner in which boards of trade comply with the core principles.

[556] *See* CEA section 5(d)(1)(B); 7 U.S.C. 7(d)(1)(B).

[557] *See id.* Congress limited the exercise of reasonable discretion by DCMs only where the Commission has acted by regulation.

[558] *See* CEA section 5(d)(5)(B) (amended 2010); 7 U.S.C. 7(d)(5)(B).

[559] *See* CEA section 5h; 7 U.S.C. 7b–3.

[560] CEA section 5h(f)(6); 7 U.S.C. 7b–3(f)(6).

[561] *Id.*

[562] CEA section 4a, as amended by the Dodd-Frank Act, provides the Commission with broad authority to set position limits. 7 U.S.C. 6a. *See supra* discussion of CEA section 4a.

[563] The position limits on these agricultural contracts are referred to as ''legacy'' limits, and the listed commodities are referred to as the ''enumerated'' agricultural commodities. This list of agricultural contracts includes Corn (and Mini-Corn), Oats, Soybeans (and Mini-Soybeans), Wheat (and Mini-wheat), Soybean Oil, Soybean Meal, Hard Red Spring Wheat, Hard Winter Wheat, and Cotton No. 2. *See* 17 CFR 150.2.

[564] 46 FR 50938, Oct. 16, 1981. The Commission stated the purpose of such limits was to prevent ''excessive speculation . . . arising from those extraordinarily large positions which may cause sudden or unreasonable fluctuations or unwarranted changes in the price'' of commodity futures. *Id.* at 50945. Former § 1.61(a)(2) specified that limits shall be based on ''such factors that will accomplish the purposes of this section. As appropriate, these factors shall include position sizes customarily held by speculative traders in the market . . . , which shall not be extraordinarily large relative to total open positions in the contract market . . . [or] breadth and liquidity of the cash market underlying each delivery month and the opportunity for arbitrage between the futures market and cash market in the commodity underlying the futures contract.'' 17 CFR 1.61 (removed and reserved on May 5, 1999).

[565] 46 FR 50938, 50939–40, Oct. 16, 1981.

[566] *Id.* at 50940.

[567] *Id.* at 50945.

[568] *Id.* at 50940.

i.e., the capacity of the market is not unlimited.[569]

Citing the recent disruption in the silver market, the Commission insisted that position limits be imposed prophylactically for all futures and options contracts, *irrespective* of the unique features of the cash market underlying a particular derivative.[570] Thus, the Commission concluded that ''speculative limits are appropriate for all contract markets,'' [571] and directed exchanges to impose them on an ''omnibus basis,'' [572] that is, on all futures contracts.[573]

Congress ratified the Commission's construction of section 4a and its promulgation of § 1.61 in the Futures Trading Act of 1982 [574] when it enacted section 4a(e) of the Act, which provides that limits set by exchanges and approved by the Commission are subject to Commission enforcement.[575]

During the 1990s, the Commission allowed exchanges to replace position limits with position accountability levels with respect to certain derivatives outside the spot month.[576] Position accountability levels are not fixed limits, but rather position sizes that trigger an exchange review of a trader's position and at which an exchange may remediate perceived problems, such as preventing a trader from increasing his position or forcing a reduction in a position. In January 1992, the Commission approved the CME's request for an exemption from the position limits requirements and permitted the CME to establish position accountability for a variety of financial contracts. Initially, the Commission limited its approval of position accountability to financial instruments (*i.e.,* excluded commodities) that had a high degree of liquidity. Six months later, the Commission determined it would also allow position accountability to be used for highly liquid energy and metals contracts.[577]

In 1999, the Commission simplified and reorganized its rules relating to speculative position limits by removing and reserving § 1.61 and relocating several of its rules and policies concerning exchange-set-position limits to new § 150.5, thereby incorporating within part 150 most Commission rules relating to speculative position limits.[578] The Commission codified within § 150.5 various staff policies and administrative practices that had developed over time relating to: (1) The speculative position limit levels that the staff routinely had recommended for approval by the Commission for newly designated futures and option contracts; (2) the magnitude of increases to the limit levels that it would approve for traded contracts; and (3) various exemptions from the general requirement that exchanges set speculative position limits for all contracts, such as permitting exchanges to substitute position accountability rules for position limits for high volume and liquid markets.[579] The Commission explained that codifying the prior administrative practices as part of new § 150.5 would make the applicable standard for exchange-set position limits more transparent and thereby make compliance easier for exchanges to achieve.[580]

Under § 150.5(a), the Commission required each exchange to ''limit the maximum number of contracts a person may hold or control, separately or in combination, net long or net short, for the purchase or sale of a commodity for future delivery or, on a futures-equivalent basis, options thereon.'' [581] The Commission noted that this provision does not apply to contracts for which position limits are set forth in § 150.2 or to a futures or option contract on a major foreign currency.[582] Furthermore, nothing in § 150.5(a) was to be construed to prohibit an exchange from setting different limits for different futures contracts or delivery months, or from exempting positions normally known in the trade as spreads, straddles, or arbitrage.[583]

In § 150.5(b), the Commission presented explicit numeric formulas and descriptive standards for the speculative position limit levels that it found to be appropriate for new contracts.[584] For physical delivery contracts, the spot month limit level must be no greater than one-quarter of the estimated spot month deliverable supply, calculated separately for each month to be listed.[585] For cash-settled contracts, the Commission presented a descriptive standard: ''the spot month limit level must be no greater than necessary to minimize the potential for manipulation or distortion of the contract's or the underlying commodity's price.'' [586] Individual non-spot-month or all-months-combined levels for such newly-designated contracts must be no greater than 1,000 contracts for tangible commodities other than energy products,[587] and no greater than 5,000 contracts for energy products and non-tangible commodities, including contracts on financial products.[588] In § 150.5(c), the Commission codified mandatory numeric formulas and descriptive standards for subsequent adjustments to spot, individual and all-months-combined position limit levels.[589]

The Commission explained that these explicit numeric formulas grew from administrative practices that had long required a deliverable supply of at least four times the spot month speculative position limit.[590] The Commission

[569] *Id.*

[570] *Id.* at 50940–41. The Commission stated it would consider the particular characteristics of the cash markets in setting limit levels, but required that all futures contracts have position limits. *Id.* at 50941.

[571] *Id.* at 50941.

[572] *Id.* at 50939.

[573] *See* 17 CFR 1.61(a)(1) (1982). In addition, § 1.61 permitted exchanges to adopt and enforce their own speculative position limits for those contracts that have federal speculative position limits, as long as the exchange limits were not higher than those set by the Commission.

[574] The Futures Trading Act of 1982, Public Law 97–444, 96 Stat. 2294 (1983).

[575] *See id; see also* 7 U.S.C. 6a(e).

[576] *See* Speculative Position Limits—Exemptions from Commission Rule 1.61, 56 FR 51687, Oct. 15, 1991; and Speculative Position Limits—Exemptions from Commission Rule 1.61, 57 FR 29064, Jun. 30, 1992.

[577] *See* 57 FR 29064, Jun. 30, 1992.

[578] 64 FR 24038, 24040, May 5, 1999. As noted in the notice of proposed rulemaking for § 150.5, promulgating these policies within a single section of the Commission's rules would increase significantly their accessibility and clarify their terms. *See* Revision of Federal Speculative Position Limits and Associated Rules, Proposed Rules, 63 FR 38537, Jul. 17, 1998.

[579] 64 FR at 24040–42. As the Commission explained, the open-interest criterion and numeric formula used by the Commission in its 1991 proposed amendment of Commission-set speculative position limits provided the most definitive guidance by the Commission on acceptable levels for speculative position limits for tangible commodities and, along with several other commonly accepted measures, had been widely followed as a matter of administrative practice when reviewing proposed exchange speculative position limits under Commission rule 1.61. *Id.* at 24040. Additionally, in reviewing new contracts for tangible commodities, the staff had relied upon the Commission's formulation providing for a minimum level of 1,000 contracts for non-spot month speculative position limits. *Id.* Moreover, the Commission had routinely approved a level of 5,000 contracts in non-spot months for designation of financial futures and energy contracts, and that level had become a rule of thumb as a matter of administrative practice. *Id.*

[580] *Id.*

[581] 17 CFR 150.5(a).

[582] *Id.*

[583] *Id.*

[584] *See* 17 CFR 150.5(b). The Commission explained that the proposed limit levels for new contracts, which were based upon the formula and associated minimum levels used by the Commission in its 1992 proposed rulemaking, had long been used as a matter of informal administrative practice. 64 FR 24040.

[585] 17 CFR 150.5(b)(1).

[586] *Id.*

[587] 17 CFR 150.5(b)(2).

[588] 17 CFR 150.5(b)(3).

[589] 17 CFR 150.5(c).

[590] 64 FR at 24041 (citing 62 FR 60831, 60838, Nov. 13, 1997). A spot month speculative position

Continued

further explained that the descriptive standards for exchange-set limits in § 150.5 grew from staff experience that had demonstrated that many commodities, particularly intangible commodities, have sufficiently large deliverable supplies to meet this standard without requiring a spot month level that is lower than the individual month level.[591]

In § 150.5(d), the Commission explicitly precluded exchanges from applying exchange-set speculative position limits rules to bona fide hedging positions as defined by an exchange in accordance with § 1.3(z)(1).[592] However, that section also provided an exchange with the discretion to limit bona fide hedging positions that it determines are ''not in accord with sound commercial practices or [that] exceed an amount which may be established and liquidated in an orderly fashion.'' [593] Under § 150.5(d)(2), the Commission explicitly required traders to apply to the exchange for any exemption from its speculative position limit rules.[594] Furthermore, under § 150.5(f), an exchange is compelled to grant additional exemptions to positions acquired in good faith prior to the effective date of any exchange position limits rule.[595] In addition to the express exemptions specified in § 150.5, § 150.5(f) permitted an exchange to propose other exemptions consistent with the purposes of § 150.5.[596]

In § 150.5(e), the Commission codified its existing policies concerning the classes of contracts for which an exchange could replace the required speculative position limit with a position accountability rule.[597] Under § 150.5(e), at least twelve months after a contract's initial listing for trading, an exchange could apply to the Commission to substitute for the position limits required under part 150 an exchange rule requiring traders to be accountable for large positions.[598] The Commission explained that the type of position accountability rule that applies to a particular contract under § 150.5(e) is determined by the liquidity of the futures market, the liquidity of the cash market and the Commission's oversight experience.[599] The Commission further explained that it used § 150.5(e) to restate these criteria with greater clarity and precision, particularly in measuring the necessary levels of liquidity of the futures and option markets.[600] Furthermore, for purposes of § 150.5(e), trading volume and open interest must be calculated by combining the month-end futures and its related option contract, on a delta-adjusted basis, for all months listed during the most recent calendar year.[601]

Lastly, the Commission codified its aggregation policy relating to exchange-set position limits in § 150.5(g).[602]

2. The Commodity Futures Modernization Act of 2000 Caused Commission § 150.5 To Become Guidance on and Acceptable Practices for Compliance With DCM Core Principle 5

Just over a year after the Commission promulgated § 150.5, the Commodity Futures Modernization Act of 2000 [603] amended the CEA to establish DCMs as a registration category and create a set of 18 core principles with which DCMs must comply.[604] DCM core principle 5 requires exchanges to adopt position limits or position accountability levels ''where necessary and appropriate to reduce the threat of market manipulation or congestion.'' [605] Under the CFMA, DCM core principle 1 gave DCMs ''reasonable discretion'' in determining how to comply with the core principles.[606] The CFMA, however, did not change the treatment of the enumerated agricultural commodities, which remain subject to Federal speculative position limits. Moreover, the CFMA did not alter the Commission's authority in CEA section 4a to establish position limits. The core principles regime set forth in the CFMA had the effect of undercutting the prescriptive rules of § 150.5 because DCMs were afforded ''reasonable discretion'' in determining how to comply with the position limits or accountability requirements of core principle 5. Nevertheless, the Commission has retained current § 150.5 as guidance on, and acceptable practices for, compliance with DCM

limit that exceeds this amount enhances the susceptibility of the contract to market manipulation, price distortion or congestion. Except for cash-settled contracts, Commission staff had used this standard to review every new contract, or proposals to increase existing exchange speculative position limits, since 1981, when § 1.61 was issued. *Id.*

[591] 64 FR at 24041. For other commodities, however, especially commodities having strong seasonal characteristics, spot month speculative position limits are required to be set at a level lower than the individual month limit for all or some trading months. *Id.* Accordingly, codification of the standard only made explicit the standard which, since 1981, had been applied to, and met by, every physical delivery futures contract at the time of initial review and upon subsequent increases to the spot month speculative position limit. *Id.*

[592] 17 CFR 150.5(d)(1); 17 CFR 1.3(z).

[593] 17 CFR 150.5(d)(1).

[594] 17 CFR 150.5(d)(2). In considering whether to grant such an application for exemption, exchanges must take into account whether the hedging position is not in accord with sound commercial practices or exceeds an amount which may be established and liquidated in an orderly fashion. *See id.*

[595] 17 CFR 150.5(f). This exemption also applies to positions acquired in good faith prior to the effective date of any exchange position limits rule by a person that is registered as a futures commission merchant or as a floor broker under authority of the Act except to the extent that transactions made by such person are made for or on behalf of the account or benefit of such person.

[596] *Id.*

[597] 17 CFR 150.5(e). Position accountability rules impose a level that triggers distinct reporting responsibilities by a trader at the request of the applicable exchange.

[598] *Id.* The Commission explained that a trading history of at least 12 months must first be established before a futures contract can meet the proposed rule's liquidity requirements. *See* Proposed Rule, 63 FR 38525, 38529, Jul. 17, 1998.

[599] Revision of Federal Position Limits and Associated Rules, Proposed Rule, 63 FR 38525, 38530, Jul. 17, 1998. The Commission explained that a liquid market is one which has sufficient trading activity to enable individual trades coming to a market to be transacted without significantly affecting the price. *Id.* A high degree of liquidity in the futures and option markets better enables traders to arbitrage these markets with the underlying cash markets. *Id.* Where the underlying cash markets in turn are very liquid and have extremely large deliverable supplies, the threat of market manipulation or distortions caused by large speculative positions is lessened. *Id.*

[600] *See* 17 CFR 150.5(e)(1)–(3); *see also* Proposed Rule, 63 FR 38525, 38530, Jul. 17, 1998.

[601] 17 CFR 150.5(e)(4).

[602] To determine whether any person has exceeded the limits established under this section, all positions in accounts for which such person by power of attorney or otherwise directly or indirectly controls trading shall be included with the positions held by such person; such limits upon positions shall apply to positions held by two or more person acting pursuant to an express or implied agreement or understanding, the same as if the positions were held by a single person. 17 CFR 150.5(g).

[603] CFMA, Public Law 106–554, 114 Stat. 2763. By enacting the CFMA, Congress intended ''[t]o reauthorize and amend the Commodity Exchange Act to promote legal certainty, enhance competition, and reduce systemic risk in markets for futures and over-the-counter derivatives, and for other purposes.'' *Id.*

[604] *See* CEA section 5(d); 7 U.S.C. 7(d). DCMs were first established under the CFMA as one of two forms of Commission-regulated markets for the trading of contracts for sale of a commodity for future delivery or commodity options (the other being registered DTEFs). In addition, the CFMA provided for two markets exempt from regulation: Exempt boards of trade (''EBOTs'') and exempt commercial markets (''ECMs''). *See* A New Regulatory Framework for Trading Facilities, Intermediaries and Clearing Organizations, Notice of Proposed Rulemaking, 66 FR 14262, Mar. 9, 2001; Final Rulemaking, 66 FR 42256, Aug. 10, 2001.

[605] CEA sections 5(d)(1), (5); 7 U.S.C. 7(d)(1), (5).

[606] CEA section 5(d)(1)(B); 7 U.S.C. 7(d)(1)(B). The Commission also undertakes due diligence reviews of each exchange's compliance with the core principles during rule and product certification reviews and periodic examinations of DCMs' compliance with the core principles under Rule Enforcement Reviews. As discussed above, DCM core principle 1 was amended by the Dodd-Frank Act to give the Commission authority to determine, by rule or regulation, the manner in which boards of trade must comply with the core principles.

core principle 5.[607] The Commission did not amend § 150.5 following passage of CFMA.

In August 2001, the Commission adopted part 38 to govern trading on DCMs post-CFMA. Under § 38.2, DCMs operating under part 38 were ''exempt from all Commission rules not specifically reserved'' [608] and § 38.2 did not reserve § 150.5.[609] Accordingly, DCMs operating under part 38 in the post-CFMA environment have not been required to comply with § 150.5. In this same rulemaking, the Commission adopted appendix B to part 38 as guidance on and acceptable practices for compliance with the DCM core principles, including core principle 5.[610] Within appendix B to part 38, the Commission advised DCMs to, among other things, adopt spot-month limits for markets based on commodities having more limited deliverable supplies, or where otherwise necessary to minimize the susceptibility of the market to manipulation or price distortions.[611] The Commission also advised DCMs on how they should set spot-moth limit levels and instructed DCMs that they could elect not to adopt all-months-combined and non-spot month limits.[612] Appendix B to part 38 was subsequently amended in June 2012 to delete the guidance and acceptable practices section relevant to compliance with DCM core principle 5 in deference to parts 150 and 151.[613]

3. The CFTC Reauthorization Act of 2008

In the CFTC Reauthorization Act of 2008, Congress, among other things, expanded the Commission's authority to set position limits to include significant price discovery contracts (''SPDCs'') on exempt commercial markets (''ECMs'').[614] The Reauthorization Act's provisions regarding ECMs were based largely on the Commission's recommendations for improving oversight of ECMs whose contracts perform or affect a significant price discovery function. The legislation significantly expanded the Commission's regulatory authority over ECMs by adding section 2(h)(7) [615] to the CEA, establishing criteria for the Commission to consider in determining whether a particular ECM contract performs a significant price discovery function, and providing for greater regulation of SPDCs traded on ECMs. The Reauthorization Act also required ECMs to adopt position limit and accountability level provisions for SPDCs, authorized the Commission to require the reporting of large trader positions in SPDCs, and established core principles governing ECMs with SPDCs. The core principles applicable to ECMs with SPDCs were largely derived from selected DCM core principles and designation criteria set forth in CEA section 5, and Congress intended that they be construed in a like manner.[616]

Much like DCM core principle 5, ECM core principle IV of CEA section 2(h)(7)(C) required electronic trading facilities to adopt where necessary and appropriate, position limits or position accountability provisions, especially during trading in the delivery month, and taking into account fungible positions at a derivative clearing organization.[617]

In a Notice of Final Rulemaking in March 2009, the Commission adopted Appendix B to Part 36 as guidance on and acceptable practices for compliance with ECM core principles.[618] The guidance on and acceptable practices for compliance with ECM core principle IV generally tracked those for DCM core principle 5 as listed in § 150.5.[619] Furthermore, the Commission indicated within this Notice of Final Rulemaking that § 150.5 was not binding on DCMs once part 38 was finalized.[620] The Commission rejected a commenter's suggestion that a proposed ECM–SPDCs core principle for position limits and accountability should adopt the existing standards in CEA section 4a(b)(2) (barring trading or positions in excess of federal limits) and, especially, incorporate a broader good faith exemption in § 150.5(f).[621] The Commission responded that section 4a(b)(2) applies to federal limits, not exchange-set limits.[622] The Commission further explained that § 150.5(f) ''no longer has direct application to DCM-set limits'' because ''the statutory authority governing [those] limits is found in CEA section 5(d)(5)—DCM core principle 5.'' [623] That core principle does not, the Commission explained, contain any of the exemptive language found in CEA section 4a or § 150.5(f).[624] The Commission observed that the part 38 rules specifically exempt DCMs and DCM-traded contracts from all rules other than those specifically reserved in § 38.2, and § 38.2 did not retain

[607] Guidance provides DCMs and DCM applicants with contextual information regarding the core principles, including important concerns which the Commission believes should be taken into account in complying with specific core principles. In contrast, the acceptable practices are more specific than guidance and provide examples of how DCMs may satisfy particular requirements of the core principles; they do not, however, establish mandatory means of compliance. Acceptable practices are intended to assist DCMs by establishing non-exclusive safe harbors. The safe harbors apply only to compliance with specific aspects of the core principle, and do not protect the exchange with respect to charges of violations of other sections of the CEA or other aspects of the core principle. In applying § 150.5 as guidance and acceptable practices, most exchanges, in exercising their ''reasonable discretion,'' have continued to impose strict position limits in the spot month and to apply position accountability standards in non-spot months.

[608] 17 CFR 38.2 (amended June 19, 2012); *see also* A New Regulatory Framework for Trading Facilities, Intermediaries and Clearing Organizations, Final Rules, 66 FR 42256, 42257, Aug. 10, 2001.

[609] *See id.*

[610] 17 CFR part 38 app. B (2002); *see also* 66 FR 42256, Aug. 10, 2001.

[611] *Id.*

[612] *Id.*

[613] *See* Core Principles and Other Requirements for Designated Contract Markets, Final Rule, 77 FR 36611, 36639, Jun. 19, 2012. The Commission published the final rules for Position Limits for Futures and Swaps on November 18, 2011, which required DCMs to comply with part 150 (Limits on Positions) until such time that the Commission replaces part 150 with the new part 151 (Limits on Positions). *Id.*

[614] CFTC Reauthorization Act of 2008, incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1651 (June 18, 2008).

[615] CEA sections 2(h)(3)–(7) were deleted by the Dodd-Frank Act on July 15, 2011, thus eliminating the ECM category.

[616] *See* Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 110–627, 110 Cong., 2d Sess. at 985 (2008). Section 723 of the Dodd-Frank Act subsequently repealed the ECM SPDC provisions. *See* Section 723 of the Dodd-Frank Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

[617] CEA section 2(h)(7)(C) (amended 2010).

[618] Significant Price Discovery Contracts on Exempt Commercial Markets, Final Rulemaking, 74 FR 12178, Mar. 23, 2009; *See also* 17 CFR part 36 app. B (2009).

[619] For example, ECMs were advised to adopt spot-month limits for SPDCs. If there was an economically-equivalent SPDC, or a contract on a DCM, then the spot-month limit should be set at the same level as that specified for such other contract. If there was not an economically-equivalent SPDC or contract traded on a DCM, then in the case of a physical delivery contact, the spot-month limit should be set based upon an analysis of deliverable supplies and the history of spot-month liquidations and at no more than 25 percent of the estimated deliverable supply or, in the case of a cash settlement provision, the spot month limit should be set at a level that minimizes the potential for price manipulation or distortion in the significant price discovery contract itself; in related futures and options contracts traded on a DCM or DTEF; in other significant price discovery contracts; in other fungible agreements, contracts and transactions; and in the underlying commodity. ECMs were also advised to adopt position accountability provisions for non-spot month and all-months combined or, in lieu of position accountability, an ECM could establish non-spot individual month position limits and all-months-combined position limits for its SPDC. *See* 17 CFR part 36 app. B (2009).

[620] *See* 74 FR 12178, 12183, Mar. 23, 2009.

[621] *See id.*

[622] *See id.*

[623] *See id.*

[624] *See id; see also* CEA Section 4a and 17 CFR 150.5(f).

§ 150.5(f).[625] Accordingly, the Commission explained, ''the part 150 rules essentially constitute guidance for DCMs administering position limit regimes, [and] Commission staff in overseeing such regimes has not required that position limits include an exemption for positions acquired in good faith.'' [626]

4. The Dodd-Frank Act Amendments to CEA Section 5

On July 21, 2010, President Obama signed The Dodd-Frank Wall Street Reform and Consumer Protection Act.[627] The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things, enhancing the Commission's rulemaking and enforcement authorities with respect to all registered entities and intermediaries subject to the Commission's oversight.[628] The Dodd-Frank Act repealed certain sections of the CEA, amended others, and added many new provisions and vastly expanded the Commission's jurisdiction. The Commission has finalized 65 rules, orders, and guidance to implement sweeping changes to the regulatory framework established by the Dodd-Frank Act.[629] This proposed rulemaking would make several conforming amendments to part 150 of the Commission's regulations, most prominently to § 150.5, in order to integrate that section more fully within the statutory framework created by the Dodd-Frank Act.

i. The Dodd-Frank Act Added Provisions That Permit the Commission To Override the Discretion of DCMs in Determining How To Comply With the Core Principles

As discussed above, DCM core principle 1, set out in CEA section 5(d)(1), states that boards of trade ''shall have reasonable discretion in establishing the manner in which they comply with the core principles.'' [630] However, section 735 of the Dodd-Frank Act amended section 5(d)(1) of the CEA to include the proviso that ''[u]nless otherwise determined by the Commission by rule or regulation . . . ,'' boards of trade shall have reasonable discretion in establishing the manner in which they comply with the core principles.[631] In view of amended CEA section 5(d)(1), which gives the Commission authority to determine, by rule or regulation, the manner in which boards of trade must comply with the core principles, the Commission has proposed a number of new and revised rules, guidance, and acceptable practices to implement the new and revised Dodd-Frank Act core principles.

ii. The Dodd-Frank Act Established a Comprehensive New Statutory Framework for Swaps

The Dodd-Frank Act tasked the Commission with overseeing the U.S. market for swaps (except for security-based swaps). Title VII of the Dodd-Frank Act amended the CEA to establish a comprehensive new regulatory framework for swaps, including requirements for SEFs.[632] This new regulatory framework includes: (1) Registration, operation, and compliance requirements for SEFs; and (2) fifteen core principles with which SEFs must comply. As a condition of obtaining and maintaining their registration as a SEF, applicants and registered SEFs are required to comply with the SEF core principles and with any requirement that the Commission may impose by rule or regulation.[633] The Dodd-Frank Act also amended the CEA to provide that, under new section 5h, the Commission may determine, by rule or regulation, the manner in which SEFs comply with the core principles.[634]

iii. The Dodd-Frank Act Added the Regulation of Swaps, Added Core Principles for SEFs, Including SEF Core Principle 6, and Amended DCM Core Principle 5

The Dodd-Frank Act added a core principle concerning position limitations or accountability for SEFs, SEF core principle 6, which parallels DCM core principle 5.[635] SEF core principle 6 requires SEFs that are trading facilities to set, ''as is necessary and appropriate, position limitations or position accountability for speculators'' [636] for each contract executed pursuant to their rules. Furthermore, for contracts subject to Federal position limits imposed by the Commission under CEA section 4a(a), CEA section 5h(f)(6)(B) [637] requires SEFs that are trading facilities to set and enforce speculative position limits at a level no higher than those established by the Commission.

The Dodd-Frank Act similarly amended DCM core principle 5 by adding that for any contract that is subject to a position limit established by the Commission pursuant to CEA section 4a(a), the DCM shall set the position limit of the board of trade at a level not higher than the position limitation established by the Commission.[638]

5. Dodd-Frank Rulemaking

To implement section 735 of the Dodd-Frank Act, the Commission has proposed a number of new and revised rules, guidance, and acceptable practices to implement the new and revised DCM core principles. In doing so, the Commission has evaluated the preexisting regulatory framework for overseeing DCMs, which consisted largely of guidance and acceptable practices, in order to update those provisions and to determine which core principles would benefit from having new or revised derivative regulations. Based on that review, and in view of the Dodd-Frank Act's amendment to section 5(d)(1) of the CEA, which grants the Commission authority to determine, by rule or regulation, the manner in which boards of trade comply with the core principles, the Commission has proposed revised guidance and acceptable practices for some core

[625] *See* 74 FR 12178, 12183, Mar. 23, 2009; *see also* 17 CFR Part 38. The Commission acknowledged that the acceptable practices in former appendix B to part 38 incorporate many provisions of § 150.5, but not § 150.5(f).

[626] 74 FR 12183. In a 2010 notice of proposed rulemaking, the Commission similarly noted that former appendix B to part 38 ''specifically reference[d] part 150'' in order to provide ''guidance'' to DCMs on how to comply with the core principle on position limits/accountability. 75 FR 4144, 4147, Jan. 26, 2010.

[627] *See generally* the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[628] Furthermore, the Dodd-Frank Act amended the DCM core principles by: (1) Eliminating the eight criteria for designation as a contract market; (2) amending most of the core principles, including incorporating the substantive requirements of the designation criteria; and (3) adding five new core principles. Accordingly, all DCMs and DCM applicants must comply with a total of 23 core principles as a condition of obtaining and maintaining designation as a contract market.

[629] 77 FR 66288, Nov. 2, 2012. *See also* amendments to CEA section 4a, discussed *above.*

[630] CEA section 5(d)(1); 7 U.S.C. 7(d)(1).

[631] *See* CEA section 5(d)(1)(B); 7 U.S.C. 7(d)(1)(B).

[632] The SEF definition is added in section 721 of the Dodd-Frank Act, amending CEA section 1a. 7 U.S.C. 1a(50).

[633] *See* CEA section 5h, as enacted by section 733 of the Dodd-Frank Act; 7 U.S.C. 7b–3.

[634] *See id.; see also* SEF core principle 1 at CEA section 5h(f)(1)(B); 7 U.S.C. 7b–3(f)(1)(B).

[635] *Compare* CEA section 5h(f)(6); 7 U.S.C. 7b–3(f)(6) with CEA section 5(d)(5); 7 U.S.C. 7(d)(5).

[636] CEA section 5h(f)(6)(A); 7 U.S.C. 7b–3(f)(6).

[637] 7 U.S.C. 7b–3(f)(6) as added by the Dodd-Frank Act.

[638] *See* CEA section 5(d)(1)(B); 7 U.S.C. 7(d)(1)(B). DCM core principle 5 under CEA section 5(d)(5) requires that DCMs adopt for each contract, as is necessary and appropriate, position limitations or position accountability.

principles and, for other core principles, has proposed to codify rules in lieu of guidance and acceptable practices.

i. Amended Part 38

In January 2011, the Commission published a notice of proposed rulemaking to replace existing part 150, in its entirety, with a new federal position limits rules regime in the form of new part 151.[639] Just one month prior to this publication, the Commission published a notice of proposed rulemaking to amend part 38 to establish regulatory obligations that each DCM must meet in order to comply with section 5 of the CEA, as amended by the Dodd-Frank Act. Accordingly, the Commission proposed § 38.301 to require that each DCM must comply with the requirements of part 151 as a condition of its compliance with DCM core principle 5.[640] The Commission later adopted a revised version of § 38.301 with an additional clause that requires DCMs to continue to meet the requirements of part 150 of the Commission's regulations—the current position limit regulations—until such time that compliance would be required under part 151.[641] The Commission explained that this clarification would ensure that DCMs are in compliance with the Commission's regulations under part 150 during the interim period until the compliance date for the new position limits regulations of part 151 would take effect.[642] The Commission further explained that new § 38.301 was based on the Dodd-Frank amendments to the DCM core principles regime, which collectively provide that DCM discretion in setting position limits or position accountability levels is limited by Commission regulations setting limits.[643]

However, in an Order dated September 28, 2012, the United States District Court for the District of Columbia vacated part 151.[644] The District Court's decision did not affect the applicability of part 150.[645] Therefore, part 150 continues to apply as if part 151 had not been finally adopted by the Commission, and § 150.5 continues to apply as non-exclusive guidance and acceptable practices for compliance with DCM core principle 5. In light of the foregoing, the Commission could not, without notice, interpret § 150.5 as a pre-requisite for compliance with core principle 5. Additionally, the Commission is proposing to amend § 38.301 by deleting the reference to vacated part 151. Proposed § 38.301 would maintain the requirement that DCMs meet the requirements of part 150, as applicable.

ii. Amended Part 37

Similarly, in the Commission's proposal to adopt a regulatory scheme applicable to SEFs, under proposed § 37.601,[646] the Commission proposed to require that SEFs establish position limits in accordance with the requirements set forth in part 151 of the Commission's regulations.[647] In the SEF final rulemaking, the Commission revised § 37.601 to state that until such time that compliance is required under part 151, a SEF may refer to the guidance and/or acceptable practices in appendix B of part 37 to demonstrate to the Commission compliance with the requirements of core principle 6.

In light of the District Court vacatur of part 151, the Commission proposes to amend § 37.601 to delete the reference to vacated part 151. Instead, this rulemaking proposes to require that SEFs that are trading facilities meet the requirements of part 150, which are comparable to the DCM's requirement, since, as proposed, § 150.5 would apply to commodity derivative contracts, whether listed on a DCM or on a SEF that is a trading facility. In addition, the Commission proposes to amend appendix B to part 37, which provides guidance on complying with core principles, both initially and on an ongoing basis, to maintain SEF registration.[648] Since this rulemaking proposes to require that SEFs that are trading facilities meet the requirements of part 150, the proposed amendments to the guidance regarding SEF core principle 6 would reiterate that requirement. For SEFs that are not trading facilities, to whom core principle 6 is not applicable under the statutory language, the proposal would provide that part 150 should be considered as guidance.

iii. Vacated Part 151

As discussed above, the United States District Court for the District of Columbia vacated part 151 of the Commission's regulations.[649] Because the District Court's decision did not affect the applicability of part 150, current § 150.5 remains as guidance and acceptable practices for compliance with DCM core principle 5 and SEF core principle 6. The Commission continues to rigorously enforce compliance with these core principles.

Vacated § 151.11 would have required DCMs and SEFs to adopt position limits for Referenced Contracts, and would have established acceptable practices for establishing position limits and position accountability for certain non-referenced contracts and excluded commodities.[650] Specifically, vacated § 151.11(a) would have required DCMs and SEFs to set spot month limits, with exceptions for securities futures and some excluded commodities.[651] Under vacated § 151.11(a)(1), the Commission would have required DCMs and SEFs to establish spot-month limits for Referenced Contracts at levels no greater than the federal position limits (established pursuant to vacated § 151.4).[652] For contracts other than Referenced Contracts (including other physical commodity contracts), it would be acceptable practice under vacated § 151.11(a)(2) for DCMs and SEFs to set position limits at levels no greater than 25 percent of estimated deliverable supply.[653] Additionally, under vacated § 151.11(c), DCMs and SEFs would have had discretion to establish position accountability levels in lieu of position

[639] Position Limits for Derivatives, Proposed Rule, 76 FR 4752, Jan. 26, 2011. The final rulemaking for vacated part 151 required DCMs to comply with part 150 until such time that the Commission replaces part 150 with the new part 151. *See* 76 FR at 71632.

[640] 75 FR 80571, 80585, Dec. 22, 2010.

[641] 77 FR 36611, 36639, Jun. 19, 2012. The Commission mandated in final § 38.301 that, in order to comply with DCM core principle 5, a DCM must ''meet the requirements of parts 150 and 151 of this chapter, as applicable.'' *See also* 17 CFR 38.301.

[642] 77 FR at 36639.

[643] *Id. See also* CEA sections 5(d)(1) and 5(d)(5) (amended 2010), and discussion *supra* of Dodd-Frank amendments to the DCM core principles.

[644] *See* 887 F. Supp. 2d 259 (D.D.C. 2012).

[645] *See id generally.*

[646] Current § 37.601 provides requirements for SEFs that are trading facilities to comply with SEF core principle 6 (Position Limits or Accountability).

[647] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR 1214 (proposed Jan. 7, 2011).

[648] Appendix B to Part 37—Guidance on, and Acceptable Practices in, Compliance with Core Principles.

[649] *See* 887 F. Supp. 2d 259 (D.D.C. 2012).

[650] *See* 76 FR at 71659–61.

[651] 76 FR at 71659.

[652] 76 FR at 71659–60. For Referenced Contracts, DCMs and SEFs would have been similarly required under vacated § 151.11(b) to set single non-spot-month and all-months limits for Referenced Contracts at levels no higher than the federal position limits (established pursuant to vacated § 151.4). *Id.* For non-referenced contracts, it would be acceptable practice under vacated § 151.11(b)(2) for DCMs and SEFs to impose limits based on ten percent of the average combined futures, swaps and delta-adjusted option month-end open interest for the most recent two calendar years up to 25,000 contracts, with a marginal increase of 2.5 percent thereafter based on open interest in the contract and economically equivalent contracts traded on the same DCM or SEF. 76 FR 71661.

[653] 76 FR at 71660. Furthermore, for non-referenced contracts, vacated § 151.11(b)(3) would have allowed as an acceptable practice the provision of speculative limits for an individual single-month or in all-months-combined at no greater than 1,000 contracts for non-energy physical commodities and at no greater than 5,000 contracts for other commodities. *Id.*

limits for excluded commodities under certain circumstances.[654]

Vacated §§ 151.11(e) and 151.11(f) would have required DCMs and SEFs to follow the same account aggregation and bona fide exemption standards set forth by vacated §§ 151.5 and 151.7 with respect to exempt and agricultural commodities.[655] With respect to a DCM's or SEF's duty to administer hedge exemptions, the Commission intended that DCMs and SEFs administer their own position limits under § 151.11.[656] Accordingly, the Commission had required under this vacated rulemaking that DCMs and SEFs create rules and procedures to allow traders to claim a bona fide hedge exemption, consistent with vacated § 151.5 for physical commodity derivatives and § 1.3(z), as was amended in the vacated rulemaking, for excluded commodities.[657]

C. Proposed Amendments to § 150.5

To implement section 735 of the Dodd-Frank Act regarding DCMs, the Commission continues to adopt new and revised rules, guidance, and acceptable practices to implement the DCM core principles added and revised by the Dodd-Frank Act. The Commission continues to evaluate its pre-Dodd-Frank Act regulations and approach to oversight of DCMs, which had consisted largely of published guidance and acceptable practices, with the aim of updating them to conform to the new Dodd-Frank Act regulatory framework. Based on that review, and pursuant to the authority given to the Commission in amended sections 5(d)(1) and 5h(f)(1) of the CEA, which permit the Commission to determine, by rule or regulation, the manner in which boards of trade and SEFs, respectively, must comply with the core principles,[658] the Commission is proposing several updates to § 150.5 to promote compliance with DCM core principle 5 and SEF core principle 6.

First, the Commission proposes amendments to the provisions of § 150.5 to include SEFs and swaps. Second, the Commission proposes to codify rules and revise acceptable practices for compliance with DCM core principle 5 and SEF core principle 6 within amended § 150.5(a) for contracts subject to the federal position limits set forth in § 150.2. Lastly, the Commission proposes to codify rules and revise guidance and acceptable practices for compliance with DCM core principle 5 and SEF core principle 6 within amended § 150.5(b) for contracts not subject to the federal position limits set forth in § 150.2.

As noted above, the CFMA core principles regime concerning position limitations or accountability for exchanges had the effect of undercutting the mandatory rules promulgated by the Commission in § 150.5. Since the CFMA amended the CEA in 2000, the Commission has retained § 150.5, but only as guidance on, and acceptable practice for, compliance with DCM core principle 5.[659] However, the Commission did not amend the text of § 150.5 following passage of CFMA, leaving language in place that could suggest that the rules originally codified within § 150.5 remain mandatory for exchanges. To correct this potential misimpression, the Commission now proposes several amendments to § 150.5 to clarify that certain provisions of § 150.5 are non-exclusive guidance on, and acceptable practice for, compliance with DCM core principle 5.

Additionally, the Commission is proposing several conforming amendments to § 150.5 in order to integrate that section more fully with the statutory framework created by the Dodd-Frank Act. The Commission, pursuant to the factors enumerated in section 4a(a)(3) of the Act, has endeavored to maximize the objectives of preventing excessive speculation, deterring and preventing market manipulation, ensuring that markets remain sufficiently liquid so as to afford end users and producers of commodities the ability to hedge commercial risks, and promoting efficient price discovery. These proposed clarifying revisions to § 150.5 should also provide exchanges with sufficient flexibility to address the divergent and changing conditions in their respective markets.

Within amended § 150.5(a), the Commission proposes to codify a set of rules and revise acceptable practices for compliance with DCM core principle 5 and SEF core principle 6 for contracts that are subject to the federal position limits set forth in § 150.2. Within amended § 150.5(b), the Commission proposes to codify rules and revise guidance and acceptable practices for compliance with DCM core principle 5 and SEF core principle 6 for contracts that are not subject to the federal position limits set forth in § 150.2.

Unlike current § 150.5, which contains only non-exclusive guidance on and acceptable practices for compliance with DCM core principle 5 (despite the presence of language that connotes mandatory rules), proposed § 150.5 contains a mix of rules that would be mandatory for compliance with DCM core principle 5 and SEF core principle 6, coupled with guidance and acceptable practices for compliance with those core principles. Accordingly, the Commission urges the reader to pay special attention to the language in proposed § 150.5 that distinguishes mandatory rules (indicated by terms such as ''must'' and ''shall'') from guidance and acceptable practices (indicated by terms such as ''should'' or ''may'').

Additionally, the Commission proposes to amend § 150.5 to implement uniform requirements for DCMs and SEFs relating to hedging exemptions across all types of contracts, including those that are subject to federal limits. The Commission also proposes to require DCMs and SEFs to have aggregation policies that mirror the federal aggregation provisions.[660] Hedging exemptions and position aggregation exemptions, if not uniform with the Commission's requirements,

[654] *Id.* Position accountability levels could be used in lieu of position limits only if the contract involves either a major currency or certain excluded commodities (such as measures of inflation, or other macroeconomic measures) or an excluded commodity that: (1) Has an average daily open interest of 50,000 or more contracts, (2) has an average daily trading volume of 100,000 or more contracts, and (3) has a highly liquid cash market. *Id. Compare* this vacated provision with current 17 CFR 150.5(e). As for physical commodities, under vacated § 151.11(c), the Commission would have allowed a DCM or SEF to establish position accountability rules as an acceptable alternative to position limits outside of the spot month for physical commodity contracts when a contract has an average month-end open interest of 50,000 contracts and an average daily volume of 5,000 contracts and a liquid cash market. *Id.*

[655] *Id.* Furthermore, under vacated § 151, the Commission would have removed the procedure to apply to the Commission for bona fide hedge exemptions for non-enumerated transactions or positions under § 1.3(z)(3). *Id.* DCMs and SEFs would have been able to recognize non-enumerated hedge transactions subject to Commission review. *Id.* Additionally, DCMs and SEFs could continue to provide exemptions for ''risk-reducing'' and ''risk-management'' transactions or positions consistent with existing Commission guidelines. *Id.* (citing Clarification of Certain Aspects of Hedging Definition, 52 FR 27195, Jul. 20, 1987; and Risk Management Exemptions from Speculative Position Limits Approved under Commission Regulation 1.61, 52 FR 34633, Sep. 14, 1987). Vacated § 151.11(f)(2) would have required traders seeking a hedge exemption to comply with the procedures of the DCM or SEF for granting exemptions from its speculative position limit rules. 76 FR 71660–61.

[656] 76 FR at 71661.

[657] *Id.* Vacated § 151.11 contemplated that DCMs and SEFs would administer their own bona fide hedge exemption regime in parallel to the Commission's regime.

[658] *See* CEA sections 5(d)(1)(B) and 5h(f)(1)(B); 7 U.S.C. 7(d)(1)(B) and 7b–3(f)(1)(B).

[659] *See id.*

[660] Aggregation exemptions are, in effect, a way for a trader to acquire a larger speculative position. The Commission believes that it is important that the aggregation rules set out, to the extent feasible, ''bright line'' standards that are capable of easy application by a wide variety of market participants while not being susceptible to circumvention.

may serve to permit a person to obtain a larger position on a particular DCM or SEF than would be permitted under the federal limits. For example, if an exchange were to grant an aggregation position to a corporate person with aggregate positions above federal limits, that exchange may permit such person to be treated as two or more persons. The person would avoid violating exchange limits, but may be in violation of the federal limits. The Commission believes that a DCM or SEF, consistent with its responsibilities under applicable core principles, may serve an important role in ensuring compliance with federal positions limits and thereby protect the price discovery function of its market and guard against excessive speculation or manipulation. In the absence of uniform hedging and position aggregation exemptions, DCMs or SEFs may not serve that role. The Commission notes that hedging exemptions and aggregation policies that vary from exchange to exchange would increase the administrative burden on a trader active on multiple exchanges, as well as increase the administrative burden on the Commission in enforcing exchange-set position limits.

The essential features of the proposed amendments to § 150.5 are summarized below.

1. Proposed Amendments to § 150.5 To Add References to Swaps and Swap Execution Facilities

As discussed above, the Dodd-Frank Act created a new type of regulated marketplace, SEFs, for which it established a comprehensive regulatory framework. A SEF must comply with fifteen enumerated core principles and any requirement that the Commission may impose by rule or regulation.[661] The Dodd-Frank Act provides that the Commission may, in its discretion, determine by rule or regulation the manner in which SEFs comply with the core principles.[662]

For contracts that are subject to federal position limits imposed under CEA section 4a(a), new CEA section 5h(f)(6)(A)[663] requires that SEFs set ''as is necessary and appropriate, position limitations or position accountability for speculators'' for each contract executed pursuant to their rules.[664] New CEA section 5h(f)(6)(B),[665] requires SEFs that are trading facilities to set and enforce speculative position limits at a level no higher than those established by the Commission.[666] The Commission recognizes that SEFs may need to contract with derivative clearing organizations in order to comply with SEF core principle 6. The Commission invites comments on the practicability and effectiveness of such arrangements. In addition, the Commission invites comment as to whether the Commission should use its exemptive authority under CEA section 4a(a)(7) to exempt SEFs from the requirements of CEA section 5h(f)(6)(B). If so, why and to what extent?

The Commission carefully considered both the novel nature of SEFs and its experience in overseeing DCMs' compliance with core principles when determining which SEF core principles to address with rules that would provide more certainty to the marketplace, and which core principles to address with guidance or acceptable practices that might provide more flexibility. The Commission has determined that the policy purposes effectuated by establishing uniform requirements for aggregation and bona fide hedging exemptions for DCM contracts are equally present in SEF markets.[667] Accordingly, the Commission has determined to amend § 150.5 to present essentially identical standards for establishing rules and acceptable practices relating to position limits (and accountability levels) for DCMs and SEFs.

2. Proposed § 150.5(a)—Requirements and Acceptable Practices for Commodity Derivative Contracts That Are Subject to Federal Position Limits

Proposed § 150.5(a) adds several requirements that a DCM or SEF must adhere to when setting position limits for contracts that are subject to the federal position limits listed in § 150.2.[668] Proposed § 150.5(a)(1) specifies that a DCM or SEF that lists a contract on a commodity that is subject to federal position limits must adopt position limits for that contract at a level that is no higher than the federal position limit.[669] Exchanges with cash-settled contracts price-linked to contracts subject to federal limits must also adopt those limit levels.

Proposed § 150.5(a)(2) prescribes the manner in which a DCM or SEF that lists a contract on a commodity that is subject to federal position limits must adopt hedge exemption rules. Proposed § 150.5(a)(2)(i) cross-references the definition of bona fide hedging, as proposed in amended § 150.1, as the regulation governing bona fide hedging positions.[670] Proposed § 150.5(a)(2)(ii) clarifies the types of spread positions for which a DCM or SEF may grant exemptions from the federal limits by cross-referencing the definitions of intermarket and intramarket spread positions in proposed § 150.1.[671] To be eligible for exemption under proposed § 150.5(a)(2)(ii), intermarket and intramarket spread positions must be outside of the spot month for physical delivery contracts, and intramarket spread positions must not exceed the federal all-months limit when combined with any other net positions in the single month. Proposed § 150.5(a)(2)(iii) would require traders to apply to the DCM or SEF for any exemption from its speculative position limit rules.[672] Proposed § 150.5(a)(2)(iii) also preserves the exchange's ability to limit bona fide hedging positions which it determines are not in accord with sound commercial practices, or which exceed

[661] *See supra* discussion of SEF core principles.

[662] *See* CEA section 5h(f)(1)(B); 7 U.S.C. 7b–3(f)(1)(B).

[663] As added by section 723 of the Dodd-Frank Act.

[664] A similar duty is imposed on DCMs under CEA section 5(d)(5)(A); 7 U.S.C. 7(d)(5)(A).

[665] As added by section 723 of the Dodd-Frank Act.

[666] This requirement for SEFs parallels that for DCMs as listed in the CEA section 5(d)(5)(B); 7 U.S.C. 7(d)(5)(B).

[667] *See* core principle 6 for SEFs, CEA section 5h(f)(6)(A); 7 U.S.C. 7b–3(f)(6)(A). The Commission notes that section 4a(a)(2) of the CEA requires the Commission to establish speculative position limits on physical commodity DCM contracts as appropriate, but did not extend this requirement to SEF contracts. *See discussion above.*

[668] As discussed above, 17 CFR 150.2 provides limits for specified agricultural contracts in the spot month, individual non-spot months, and all-months-combined.

[669] Proposed § 150.5(a)(1) is in keeping with the mandate in core principle 5 as amended by the Dodd-Frank Act. *See* CEA section 5(d)(1)(B); 7 U.S.C. 7(d)(1)(B). SEF core principle 6 parallels DCM core principle 5. *Compare* CEA section 5h(f)(5); 7 U.S.C. 7b–3(f)(5) with CEA section 5(d)(5); 7 U.S.C. 7(d)(5).

[670] *Compare* 17 CFR 150.5(d) which explicitly precludes exchanges from applying exchange-set speculative position limits rules to bona fide hedging positions as defined by the exchange in accordance with § 1.3(z)(1).

[671] The Commission has proposed to maintain the current practice in 17 CFR 150.2 of setting single-month limits at the same levels as all-months limits, rendering the ''spread'' exemption in 17 CFR 150.3 unnecessary. However, since DCM core principle 5 allows exchanges to set more restrictive limits than the federal limits, a DCM or SEF may set the single month limit at a level lower than that of the all-month limit, an exemption for intramarket spread position may be useful. *See* CEA section 5(d)(5); 7 U.S.C. 7(d)(5). An exemption for intramarket spread positions would be unnecessary if the DCM or SEF sets the single month limit at the same level as the all-months limit.

Additionally, the duplicative term ''arbitrage'' would be removed because CEA section 4a(a)(1) explains that ''the word 'arbitrage' in domestic markets shall be defined to mean the same as 'spread' or 'straddle.' '' 7 U.S.C. 6a(a)(1).

[672] Hence, proposed § 150.5(a)(2)(C) would codify as a requirement for DCMs and SEFs the acceptable practice concerning application for exemption listed in 17 CFR 150.5(d)(2).

an amount that may be established and liquidated in an orderly fashion.[673]

Proposed § 150.5(a)(3)(i) requires a DCM or SEF to exempt from speculative position limits established under § 150.2 a swap position acquired in good faith prior to the effective date of such limits.[674] However, proposed § 150.5(a)(3)(i) would allow a person to net such a pre-existing swap with post-effective date commodity derivative contracts for the purpose of complying with any non-spot-month speculative position limit. Furthermore, proposed § 150.5(a)(3)(ii) requires a DCM or SEF to exempt from non-spot-month speculative position limits established under § 150.2 any commodity derivative contract acquired in good faith prior to the effective date of such limit. However, such a pre-existing commodity derivative contract position must be attributed to the person if the person's position is increased after the effective date of such limit.[675]

The Commission proposes to require DCMs and SEFs to have aggregation polices that mirror the federal aggregation provisions.[676] Therefore, proposed § 150.5(a)(4) requires DCMs and SEFs to have aggregation rules that conform to the uniform standards listed in § 150.4.[677]

A DCM or SEF would continue to be free to enforce position limits that are more stringent that the federal limits. The Commission clarifies that federal spot month position limits do not to apply to physical-delivery contracts after delivery obligations are established.[678] Exchanges generally prohibit transfer or offset of positions once long and short position holders have been assigned delivery obligations. Proposed § 150.5(a)(6) would clarify acceptable practices for a DCM or SEF to enforce spot month limits against the combination of, for example, long positions that have not been stopped, stopped positions, and deliveries taken in the current spot month.[679]

3. Proposed § 150.5(b)—Requirements and Acceptable Practices for Commodity Derivative Contracts That Are Not Subject to Federal Position Limits

The Commission sets forth in proposed § 150.5(b) requirements and acceptable practices applicable to DCM- and SEF-set speculative position limits for any contract that is not subject to federal position limits, including physical and excluded commodities.[680]

As discussed above, the Commission proposes to revise § 150.5 to implement uniform requirements for DCMs and SEFs relating to hedging exemptions across all types of commodity derivative contracts, including those that are not subject to federal position limits. The Commission further proposes to require DCMs and SEFs to have uniform aggregation polices that mirror the federal aggregation provisions for all types of commodity derivative contracts, including for contracts that are not subject to federal position limits. As explained above, hedging exemptions and aggregation policies that vary from exchange to exchange would increase the administrative burden on a trader active on multiple exchanges, as well as increase the administrative burden on the Commission in monitoring and enforcing exchange-set position limits.

Therefore, proposed § 150.5(b)(5)(i) would require any hedge exemption rules adopted by a designated contract market or a swap execution facility that is a trading facility to conform to the definition of bona fide hedging position in proposed § 150.1. In addition to this affirmative rule, proposed § 150.5(b)(5) would set forth acceptable practices for DCMs and SEFs to grant exemptions from position limits for positions, other than bona fide hedging positions, in contracts not subject to federal limits. Such exemptions generally track the exemptions set forth in proposed § 150.3, and are suggested as acceptable practices based on the same logic that underpins the proposed § 150.3 exemptions.[681] It would be acceptable practice for a DCM or SEF to grant exemptions under certain circumstances for financial distress, intramarket and intermarket spreads, and qualifying cash-settled contract positions in the spot month.[682] Additionally, proposed § 150.5(b)(5)(ii) would set forth an acceptable practice for a DCF or SEF to grant a limited risk management exemption for contracts on excluded commodities pursuant to rules submitted to the Commission, and consistent with the guidance in new appendix A to part 150.[683]

Proposed § 150.5(b)(6) and (7) set forth acceptable practices relating to pre-enactment and transition period swap positions (as those terms are defined in proposed § 150.1),[684] and to commodity derivative contract positions acquired in good faith prior to the effective date of mandatory federal speculative position limits.

Additionally, for any contract that is not subject to federal position limits, proposed § 150.5(b)(8) requires the DCM or SEF to conform to the uniform federal aggregation provisions.[685] This proposed requirement generally mirrors the requirement in proposed § 150.5(a)(4) for contracts that are subject to federal position limits by requiring the DCM or SEF to have

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673 Proposed § 150.5(a)(2)(C) presents guidance that largely mirrors the guidance provided in the second half of 17 CFR 150.5(d), with edits to specify DCMs and SEFs.

674 The Commission is exercising its authority under CEA section 4a(a)(7) to exempt pre-Dodd-Frank and transition period swaps from speculative position limits (unless the trader elects to include such a position to net with post-effective date commodity derivative contracts). Such a pre-existing swap position will be exempt from initial spot month speculative position limits.

675 Notwithstanding any pre-existing exemption adopted by a DCM or SEF that applies to speculative position limits in non-spot months, a person holding pre-existing commodity derivative contracts (except for pre-existing swaps as described above) must comply with spot month speculative position limits. However, nothing in proposed § 150.5(a)(3)(B) would override the exclusion of pre-Dodd-Frank and transition period swaps from speculative position limits.

676 *See supra* discussion concerning aggregation.

677 Proposed § 150.5(a)(4) references 17 CFR 150.4 as the regulation governing aggregation for contracts subject to federal position limits and would replace 17 CFR 150.5(g). *See supra* the Commission's explanation for implementing uniform aggregation standards across DCMs and SEFs.

678 Therefore, federal spot month position limits do not apply to positions in physical-delivery contracts on which notices of intention to deliver have been issued, stopped long positions, delivery obligations established by the clearing organization, or deliveries taken.

679 For example, an exchange may restrict a speculative long position holder that otherwise would obtain a large long position, take delivery, and seek to re-establish a large long position in an attempt to corner a significant portion of the deliverable supply or to squeeze shorts. Proposed § 150.5(b)(9) would set forth the same acceptable practices for contracts not subject to federal limits.

680 For position limits purposes, proposed § 150.1(k) would define ''physical commodity'' to mean any agricultural commodity, as defined in 17 CFR 1.3, or any exempt commodity, as defined in section 1a(20) of the Act. Excluded commodity is defined in section 1a(19) of the Act.

681 *See supra* discussion of the § 150.3 exemptions.

682 *See id.*

683 New appendix A to part 150 is intended to capture the essence of the Commission's 1987 interpretation of its definition of bona fide hedge transactions to permit exchanges to grant hedge exemptions for various risk management transactions. *See* Risk Management Exemptions From Speculative Position Limits Approved Under Commission Regulation 1.61, 52 FR 34633, Sep. 14, 1987. The Commission specified that such exemptions be granted on a case-by-case basis, subject to a demonstrated need for the exemption. It also required that applicants for these exemptions be typically engaged in the buying, selling, or holding of cash market instruments. *See id.* Additionally, the Commission required the exchanges to monitor the exemptions they granted to ensure that any positions held under the exemption did not result in any large positions that could disrupt the market. *See id.* The term ''excluded commodity'' is defined in CEA section 1(a)(19).

684 *See supra* discussion of pre-enactment and transition period swap positions.

685 Proposed § 150.5(b)(7) would replace 17 CFR 150.5(g) as it relates to contracts that are not subject to federal position limits.

aggregation rules that conform to § 150.4.

The Commission proposes in § 150.5(b) to generally update and reorganize the set of acceptable practices listed in current § 150.5 as it relates to contracts that are not subject to the federal position limits. For existing and newly established DCMs and newly established SEFs, these acceptable practices generally concern how to: (1) Set spot-month position limits; (2) set individual non-spot month and all-months-combined position limits; (3) set position limits for cash-settled contracts that use a reference contract as a price source; (4) adjust position limit levels after a contract has been listed for trading; and (5) adopt position accountability in lieu of speculative position limits.

For a derivative contract that is based on a commodity with a measurable deliverable supply, proposed § 150.5(b)(1)(i)(A) updates the acceptable practice in current § 150.5(b)(1) whereby spot month position limits should be set at a level no greater than one-quarter of the estimated deliverable supply of the underlying commodity.[686] Proposed § 150.5(b)(1)(i)(A) clarifies that this acceptable practice for setting spot month position limits would apply to any commodity derivative contract, whether physical-delivery or cash-settled, that has a measurable deliverable supply.[687]

For a derivative contract that is based on a commodity without a measurable deliverable supply, proposed § 150.5(b)(1)(i)(B) would codify as guidance that the spot month limit level should be no greater than necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price.[688]

Proposed § 150.5(b)(1)(ii)(A) preserves the existing acceptable practice in current § 150.5(b)(2) whereby individual non-spot or all-months-combined levels for agricultural commodity derivative contracts that are not subject to the federal limits should be no greater than 1,000 contracts at initial listing. The proposed rule would also codify as guidance that the 1,000 contract limit should be taken into account when the notional quantity per contract is no larger than a typical cash market transaction in the underlying commodity, or reduced if the notional quantity per contract is larger than a typical cash market transaction.[689] Additionally, proposed § 150.5(b)(1)(ii)(A) would codify that if the commodity derivative contract is substantially the same as a pre-existing DCM or SEF commodity derivative contract, then it would be an acceptable practice for the DCM or SEF to adopt the same limit as applies to that pre-existing commodity derivative contract.[690]

Proposed § 150.5(b)(1)(ii)(B) preserves the existing acceptable practice, set forth in current § 150.5(b)(3), for DCMs to set individual non-spot or all-months-combined limits at levels no greater than 5,000 contracts at initial listing, but would apply this acceptable practice on a wider scale to both exempt and excluded commodity derivative contracts.[691] Proposed § 150.5(b)(1)(ii)(B) would codify as guidance for exempt and excluded commodity derivative contracts that the 5,000 contract limit should be applicable when the notional quantity per contract is no larger than a typical cash market transaction in the underlying commodity, or should be reduced if the notional quantity per contract is larger than a typical cash market transaction. Additionally, proposed § 150.5(b)(1)(B)(ii) would codify a new acceptable practice for a DCM or SEF to adopt the same limit as applies to the pre-existing contract if the new commodity contract is substantially the same as an existing contract.

Proposed § 150.5(b)(1)(iii) sets forth that if a commodity derivative contract is cash-settled by referencing a daily settlement price of an existing contract listed on a DCM or SEF, then it would be an acceptable practice for a DCM or SEF to adopt the same position limits as the original referenced contract, assuming the contract sizes are the same. Based on its enforcement experience, the Commission believes that limiting a trader's position in cash-settled contracts in this way diminishes the incentive to exert market power to manipulate the cash-settlement price or index to advantage a trader's position in the cash-settled contract.[692]

Proposed § 150.5(b)(2)(i) updates the acceptable practices in current § 150.5(c) for adjusting limit levels for the spot month. For a derivative contract that is based on a commodity with a measurable deliverable supply, proposed § 150.5(b)(2)(i) maintains the acceptable practice in current § 150.5(c) to adjust spot month position limits to a level no greater than one-quarter of the estimated deliverable supply of the underlying commodity, but would apply this acceptable practice to any commodity derivative contract, whether physical-delivery or cash-settled, that has a measurable deliverable supply. For a derivative contract that is based on a commodity without a measurable deliverable supply, proposed § 150.5(b)(1)(i)(B) would codify as

[686] Proposed § 150.5(b)(1)(i)(A) is consistent with the Commission's longstanding policy regarding the appropriate level of spot-month limits for physical delivery contracts. These position limits would be set at a level no greater than 25 percent of estimated deliverable supply. The spot-month limits would be reviewed at least every 24 months thereafter. The proposed deliverable supply formula narrowly targets the trading that may be most susceptible to, or likely to facilitate, price disruptions. The formula seeks to minimize the potential for corners and squeezes by facilitating the orderly liquidation of positions as the market approaches the end of trading and by restricting swap positions that may be used to influence the price of referenced contracts that are executed centrally.

[687] In general, the term ''deliverable supply'' means the quantity of the commodity meeting a derivative contract's delivery specifications that can reasonably be expected to be readily available to short traders and saleable to long traders at its market value in normal cash marketing channels at the derivative contract's delivery points during the specified delivery period, barring abnormal movement in interstate commerce. Proposed § 150.1 would define commodity derivative contract to mean any futures, option, or swap contract in a commodity (other than a security futures product as defined in CEA section 1a(45)).

[688] This descriptive standard is largely based on the language of DCM core principle 5 and SEF core principle 6. The Commission does not suggest that an excluded commodity derivative contract that is based on a commodity without a measurable supply should adhere to a numeric formula in setting spot month position limits.

[689] The Commission explained what it considers to be a ''typical cash market transaction'' in the preamble for final part 151 (subsequently vacated): ''[f]or example, if a DCM or SEF offers a new physical commodity contract and sets the notional quantity per contract at 100,000 units while most transactions in the cash market for that commodity are for a quantity of between 1,000 and 10,000 units and exactly zero percent of cash market transactions are for 100,000 units or greater, then the notional quantity of the derivatives contract offered by the DCM or SEF would be atypical. This clarification is intended to deter DCMs and SEFs from setting non-spot-month position limits for new contracts at levels where they would constitute non-binding constraints on speculation through the use of an excessively large notional quantity per contract. This clarification is not expected to result in additional marginal cost because, among other things, it reflects current Commission custom in reviewing new contracts and is an acceptable practice for core principle compliance and not a requirement per se for DCMs or SEFs.'' *See* 76 FR 71660.

[690] In this context, ''substantially the same'' means a close economic substitute. For example, a position in Eurodollar futures can be a close economic substitute for a fixed-for-floating interest rate swap.

[691] In contrast, 17 CFR 150.5(b)(3) lists this as an acceptable practice for contracts for energy products and non-tangible commodities. Excluded commodity is defined in CEA section 1a(19), and exempt commodity is defined CEA section 1a(20).

[692] With respect to cash-settled contracts where the underlying product is a physical commodity with limited supplies, enabling a trader to exert market power (including agricultural and exempt commodities), the Commission has viewed the specification of speculative position limits to be an essential term and condition of such contracts in order to ensure that they are not readily susceptible to manipulation, which is the DCM core principle 3 requirement.

guidance that the spot month limit level should not be adjusted to levels greater than necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price. Proposed § 150.5(b)(2)(i) would codify as a new acceptable practice that spot month limit levels be reviewed no less than once every two years.

Proposed § 150.5(b)(2)(ii) maintains as an acceptable practice the basic formula set forth in current § 150.5(c)(2) for adjusting non-spot-month limits at levels of no more than 10% of the average combined futures and delta-adjusted option month-end open interest for the most recent calendar year up to 25,000 contracts, with a marginal increase of 2.5% of the remaining open interest thereafter. Proposed § 150.5(b)(2)(ii) would also maintain as an alternative acceptable practice the adjustment of non-spot-month limits to levels based on position sizes customarily held by speculative traders in the contract. Proposed § 150.5(b)(3) generally updates and reorganizes the existing acceptable practices in current § 150.5(e) for a DCM or SEF to adopt position accountability rules in lieu of position limits, under certain circumstances, for contracts that are not subject to federal position limits. This proposed section reiterates the DCM's authority, with conforming changes for SEFs, to require traders to provide information regarding their position when requested by the exchange.[693] Proposed § 150.5(b)(3) would codify a new acceptable practice for a DCM or SEF to require traders to consent to halt from increasing their position in a contract if so ordered. Proposed § 150.5(b)(3) would also codify a new acceptable practice for a DCM or SEF to require traders to reduce their position in an orderly manner.

Proposed § 150.5(b)(3)(i) would maintain the acceptable practice for a DCM or SEF to adopt position accountability rules outside the spot month, in lieu of position limits, for an agricultural or exempt commodity derivative contract that: (1) has an average month-end open interest of 50,000 contracts and an average daily volume of 5,000 or more contracts during the most recent calendar year; (2) has a liquid cash market; and (3) is not subject to federal limits in § 150.2—provided, however, that such DCM or SEF should adopt a spot month speculative position limit with a level no greater than one-quarter of the estimated spot month deliverable supply.[694]

For an excluded commodity derivative contract that has a highly liquid cash market and no legal impediment to delivery, proposed § 150.5(b)(3)(ii)(A) would maintain the acceptable practice for a DCM or SEF to adopt position accountability rules in the spot month in lieu of position limits. For an excluded commodity derivative contract without a measurable deliverable supply, proposed § 150.5(b)(3)(ii)(A) would codify an acceptable practice for a DCM or SEF to adopt position accountability rules in the spot month in lieu of position limits because there is not a deliverable supply that is subject to manipulation. However, for an excluded commodity derivative contract that has a measurable deliverable supply, but that may not be highly liquid and/or is subject to some legal impediment to delivery, proposed § 150.5(b)(3)(ii)(A) sets forth an acceptable practice for a DCM or SEF to adopt a spot-month position limit equal to no more than one-quarter of the estimated deliverable supply for that commodity, because the estimated deliverable supply may be susceptible to manipulation. Furthermore, proposed § 150.5(b)(3)(ii) would remove the ''minimum open interest and volume'' test for excluded commodity derivative contracts generally.[695] Proposed § 150.5(b)(3)(ii)(B) would codify an acceptable practice for a DCM or SEF to adopt position accountability levels for an excluded commodity derivative contract in lieu of position limits in the individual non-spot month or all-months-combined.

Proposed § 150.5(b)(3)(iii) adds a new acceptable practice for an exchange to list a new contract with position accountability levels in lieu of position limits if that new contract is substantially the same as an existing contract that is currently listed for trading on an exchange that has already adopted position accountability levels in lieu of position limits.[696]

Proposed § 150.5(b)(4) maintains the acceptable practice that for contracts not subject to federal position limits, DCMs and SEFs should calculate trading volume and open interest as established in current § 150.5(e)(4).[697] Proposed § 150.5(b)(4) would build upon these standards by accounting for swaps in reference contracts on a futures-equivalent basis.[698]

III. Related Matters

A. Considerations of Costs and Benefits

1. Background

Generally, speculative position limits cap the size of positions that a person may hold or control in commodity derivative contracts for speculative purposes.[699] First authorized in 1936,[700] position limits are not a new regulatory tool for containing speculative market activity. The Commission and its predecessors have directly set limits for futures and options contracts on certain agricultural commodities since 1938. Additionally, for approximately 20 years from 1981 until the Commodity Futures Modernization Act (''CFMA'')[701] amended the CEA to substitute a core-principles-based, self-regulatory model for futures exchanges, Commission rules required exchanges to set position limits (or, in certain

[693] *Compare* 17 CFR 150.5(e)(2)–(3).

[694] 17 CFR 150.5(e)(3) applies this acceptable practice to a ''tangible commodity, including, but not limited to metals, energy products, or international soft agricultural products.'' Also, *compare* the ''minimum open interest and volume test'' in proposed § 150.5(b)(3)(i) with that in current § 150.5(e)(3).

[695] The ''minimum open interest and volume'' test, as presented in 17 CFR 150.5(e)(1)–(2), need not be used to determine whether an excluded commodity derivative contract should be eligible for position accountability rules in lieu of position limits in the spot month.

[696] *See supra* discussion of what is meant by ''substantially the same'' in this context.

[697] For SEFs, trading volume and open interest for swaptions should be calculated on a delta-adjusted basis.

[698] ''Futures-equivalent'' is a defined term in proposed § 150.1 that accounts for swaps in referenced contracts.

[699] Derivative contracts—*i.e.,* futures, options and swaps—may not transfer any ownership interest in the underlying commodity, but their prices are substantially derived from the value of the underlying commodity. Those who purchase or sell derivatives do so either to hedge or speculate. Generally, hedging is the use of derivatives markets by commodity producers, merchants or end-users to manage their exposure to fluctuation in the price of a commodity that a producer or user intends to use or produce; speculation, in contrast, is the use of derivative markets to profit from price appreciation or depreciation in the underlying commodity. Because the limits only restrict positions obtained for speculative purposes, this discussion refers interchangeably to ''position limits,'' ''speculative position limits,'' or ''speculative limits.''

[700] Congress first granted the CEC, a Commodity Futures Trading Commission predecessor, authority to set speculative position limits as part of the New Deal reforms enacted in the Commodity Exchange Act of 1936. Public Law 74–765, 49 Stat. 1491, 1492 (codified at 7 U.S.C. 6a(1) (1940)). Specifically, Congress authorized the CEC to ''fix such limits on the amount of trading . . . which may be done by any person as the [CEC] finds is necessary to diminish, eliminate, or prevent such burden.'' Congress exempted positions attributable to bona fide hedging. Unless otherwise indicated, references in this discussion to the ''Commission'' mean the Commodity Futures Trading Commission as well as its predecessor agencies, including the CEC.

[701] Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (Dec. 21, 2000).

specified cases, position accountability levels) for futures and options contracts not subject to Commission-imposed limits.[702] Through amendments to the CEA over more than 75 years and a number of legislative reauthorizations, the Commission's basic authority to establish speculative position limits, now codified in CEA section 4a(a), has remained constant.[703]

The backdrop for this basic authority is a public record replete with Congressional and other official governmental investigations and reports—issued over more than 80 years—critical of the harm attributed to ''excess speculation'' in derivative markets. From the 1920s through 2009, a litany of official government investigations, hearings and reports document disruptive speculative behavior; [704] several of the earliest link the behavior to artificial price effects and impaired commodity distribution efficiency, and recommend mandatory position limits as a tool to curb speculative abuses and their ill-effects. The statute reflects and responds to the centerpiece concern of these hearings and reports. Indeed, CEA section 4a(a)(1) states Congress's express determination that excessive commodity speculation causing sudden or unreasonable price fluctuations or unwarranted changes in commodity prices is an undue and unnecessary burden on interstate commerce, and mandates that the Commission set position limits, including prophylactic limits, to diminish, eliminate, or prevent this burden.[705]

The longstanding statutory approach to position limit regulation reflects two important concepts with direct bearing on the benefits and costs involved in this rulemaking. First is the distinction between speculative trading, for which limits are statutorily authorized, and, as to derivatives for physical commodities, mandated, and bona fide hedging, for which they are not.[706] This distinction is important because a chief purpose of position limits is to preserve the integrity of derivative markets for the benefit of producers that use them to hedge risk and consumers that consume the underlying commodities.

Second is the distinction between speculation generally and excessive speculation as addressed in CEA section 4a(a)(1). While, as noted above, numerous government inquires have linked speculation at excessive levels to abuses and burdens on commerce, below excessive levels, speculation provides needed liquidity to derivative markets.[707]

In 2010 the Dodd-Frank Act [708] amended CEA section 4a(a). These amendments responded to the 2008 financial crisis and came in the wake of three Congressional reports within a three-year span finding increased and/or ''excessive'' derivative market speculation linked to increased and distorted prices. These reports recommended increased statutory authority to, in the parlance of two of the reports, put the Commission ''back on the beat.'' [709] Among other things, the Dodd-Frank Act [710] expanded the Commission's speculative position limit authority under CEA section 4a to

[702] *See, e.g.,* 46 FR 50938, 50940, Oct. 16, 1981. As discussed above, following enactment of the CFMA, which among other things afforded DCMs discretion to set appropriate position limits under DCM core principle 5, these rules, then contained in § 150.5, became ineffective as requirements; they were retained, however, as guidance and acceptable practices for DCMs to use in meeting their core principle 5 compliance obligations. 74 FR 12178, 12183, Mar. 23, 2009.

[703] One of these amendments, the Commodity Futures Trading Act of 1974, created the CFTC and granted it expanded jurisdiction beyond the certain enumerated agricultural products of its predecessor to all ''services, rights, and interests'' in which futures contracts are traded. Public Law 93–463, 88 Stat. 1389 (1974).

[704] *See, e.g.,* Federal Trade Commission, ''Report of the Federal Trade Commission on the Grain Trade,'' vol. VI, at 60–62 (1924)(documenting a number of ''violent fluctuations of price'' over the preceding 30 years evidencing ''the close connection between extreme fluctuations in annual average prices of cash grain and unusual speculative activity in the futures market''); *id.* vol. VII, at 293–294 (1926)(recommending limitation on individual open interest because the ''very large trader . . . [w]hether he is more often right than wrong . . . and whether influenced by a desire to manipulate or not . . . can cause disturbances in the market which impair its proper functioning and are harmful to producers and consumers''); Grain Futures Administration, ''Fluctuations in Wheat Futures,'' S. Doc. No. 69–135, at 1,6 (1926) (investigation of ''wide and erratic [1925 wheat futures] price fluctuations . . . were largely artificial[,] were caused primarily . . . by heavy trading on the part of a limited number of professional speculators [that] completely disrupted the market and resulted in abnormal fluctuations . . . felt in every other large grain market in the world;'' concludes that limitations on the extent of daily trading by speculators are ''inevitable . . . if there is to be eliminated from the market those hazards which are so unmistakably reflected as existing whenever excessively large lines are held by individuals''); 1932 Annual Report of the Chief of the Grain Futures Admin., at 4, 8 (describing the 16 percent drop in May wheat prices during a 21-day period as illustrative of the price impact of ''short selling by a few large traders;'' again stresses the need for legislation authorizing limitations to eliminate ''the economic evils incident to market domination by a few powerful operators trading for speculative account''); 1950 Annual Report of the Administrator of the Commodity Exchange Authority, at 14–15 (speculative operations by a small number of traders holding a large proportion of long contracts ''distorted egg future prices in October 1949 and disrupted orderly marketing of the commodity causing financial losses;'' notes that enforcement of speculative limits is a ''strong deterrent to excessive speculation by large traders''); Commodity Futures Trading Commission, Report To The Congress In Response To Section 21 Of The Commodity Exchange Act, May 29, 1981, Part Two, A Study of the Silver Market (addressing silver market corner discussed *above*); ''The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat,'' Staff Report, Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs, U.S. Senate, S. Rpt. No. 109–65 at 1 (June 27, 2006) (addressing speculation and price increases in oil and gas markets) [hereinafter ''Oil & Gas Report'']; ''Excessive Speculation in the Natural Gas Market, Staff Report,'' Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs, U.S. Senate, at 1 (June 25, 2007) (addressing speculation, price increases and market distortion in natural gas markets discussed *above*) [hereinafter ''Gas Report'']; ''Excessive Speculation in the Wheat Market;'' Staff Report, Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs, U.S. Senate, at 2 (June 24, 2009) (addressing excessive speculation in wheat futures contracts by commodity index traders) [hereinafter ''Wheat Report'']; *see also* Jerry W. Markham, ''The History of Commodity Futures Trading and its Regulation,'' at 3–47 (1987) (summarizes numerous incidents of large speculative trader abuse in an array of commodities from the emergence of futures exchanges in the mid-1800s through the 1970s).

[705] The roots of this statutory determination date back to 1922, when Congress found ''sudden or unreasonable fluctuations in the prices'' of certain commodity futures transactions ''frequently occur as a result of [ ] speculation, manipulation or control'' and that ''such fluctuations in prices are an obstruction to and a burden upon'' interstate commerce. Grain Futures Act of 1922, ch. 369 at section 3, 342 Stat. 998, 999 (1922), codified at 7 U.S.C. 5 (1925–26).

[706] *See* CEA section 4a(c)(1); 7 U.S.C. 6a(c)(1).

[707] Hedgers do not always trade simultaneously in the same quantities in opposing directions. That is, long and short hedgers may trade at different times and with different quantities, often making transactions between only hedgers unfeasible. Speculative traders thus provide a trading partner for hedgers for whom there is no feasible hedger counterparty. In so doing, speculators provide valuable liquidity to the market.

[708] Public Law 111–203, 124 Stat. 1376 (2010).

[709] *See, e.g.,* Wheat Report, at 15–16 (excessive speculation in wheat futures contracts by commodity index traders contributed to ''unreasonable fluctuations or unwarranted changes'' in wheat futures prices, resulting in an abnormally large and persistent gap between wheat futures and cash prices (the basis);'' commerce was unduly burdened; stiffened position limit regulation for index traders recommended); Gas Report, at 3–7 (''[t]he current regulatory system was unable to prevent [the hedge fund] Amaranth's excessive speculation in the 2006 natural gas market;'' the experience demonstrated ''how excessive speculation can distort prices'' and have ''serious consequences for other market participants;'' and the Commission should be put ''back on the beat''); Oil & Gas Report, at 6–7 (heavy speculation in commodity energy markets contributed to rising U.S. energy prices, distorting the historical relationship between price and inventory; recommends putting the CFTC ''back on the beat'' to police these markets by eliminating the ''Enron'' loophole that limited it from doing so). In the interval between the two reports addressed to energy market speculation and the Dodd-Frank Act amendments, Congress also expanded the Commission's authority to set position limits for significant price discovery contracts on exempt commercial markets. *See* Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (2008).

[710] Dodd-Frank Act section 737(a).

mandate that the Commission: (i) establish limits on the amount of positions, as appropriate, that may be held by any person in agricultural and exempt commodity [711] futures and options contracts traded on a DCM (CEA section 4a(a)(2));* * * [712] (ii) establish at an appropriate level position limits for swaps that are economically equivalent to those futures and options that are subject to mandatory position limits pursuant to CEA section 4a(a)(2), and do so at the same time as the CEA section 4a(a)(2) limits are established (CEA section 4a(a)(5)); and (iii) apply position limits on an aggregate basis to contracts based on the same underlying commodity across enumerated trading venues [713] (CEA section 4a(a)(6)).

Additionally, the Dodd-Frank Act requires DCMs and SEFs to set position limits for any contract subject to a Commission-imposed limit at a level not higher than the Commission's limit.[714] Finally, the Dodd-Frank Act, through new CEA section 4a(c)(2), requires that the Commission define bona fide hedging positions pursuant to an express framework for purposes of exclusion from position limits. The Commission's approach, historically, to exercising its statutory position limits authority has been to set or order limits prophylactically to deter all forms of manipulation and to diminish, eliminate, or prevent excessive speculation.[715] It has done so through regulations comprised of three primary components: (1) The level of the limits, which set a threshold that restricts the number of speculative positions that a person may hold in the spot-month, in any individual month, and in all months combined; (2) the standards for what constitute bona fide hedging versus speculative transactions, as well as other exemptions; and (3) the accounts and positions a person must aggregate for the purpose of determining compliance with the position limit levels. These rules now reside in part 150 of the Commission's regulations.[716] The rules proposed herein would amend part 150 and make certain conforming amendments to related reporting requirements in parts 15, 17 and 19. They would do so in a manner that represents an extension of the Commission's historical approach towards the first two components: limit levels and exemptions. The third component, aggregation, is addressed in a separate Commission rulemaking.[717]

i. Statutory Mandate To Consider Costs and Benefits

CEA section 15(a) [718] requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. CEA section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.[719]

The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the CEA section 15(a) factors.

Accordingly, the discussion that follows identifies, and considers against the five CEA section 15(a) factors, benefits and costs to market participants and the public that the Commission expects to flow from these proposed rules relative to the statutory requirements of the CEA and the Commission's regulations now in effect. The Commission has attempted to quantify the costs and benefits of these regulations where feasible. Where quantification is not feasible the Commission identifies and considers costs and benefits qualitatively.

Beyond specific questions interspersed throughout its discussion, the Commission generally requests comment on all aspects of its consideration of costs and benefits, including: identification and assessment of any costs and benefits not discussed therein; data and any other information to assist or otherwise inform the Commission's ability to quantify or qualify the benefits and costs of the proposed rules; and, substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission's consideration of costs and benefits.

The following consideration of benefits and costs is generally organized according to the following rules proposed in this release: definitions (§ 150.1),[720] federal position limits (§ 150.2), exemptions to limits (§ 150.3), position limits set by DCMs and SEFs (§ 150.5), anticipatory hedging requirements (§ 150.7), and reporting requirements (§ 19.00). For each rule, the Commission summarizes the proposed rule and considers the benefits and costs expected to result from it.[721] The Commission then considers the benefits and costs of the proposed rules collectively in light of the five public

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[711] As defined in CEA section 1a(20), ''exempt commodity'' means a commodity that is neither an agricultural commodity nor an ''excluded commodity.'' Excluded commodities, in turn, are defined in CEA section 1a(19) to encompass specified groups of financial and occurrence-based commodities. Accordingly, exempt commodities include energy products and metals. The Dodd-Frank mandate in CEA section 4a(a)(2) to impose limits applies to all agricultural and exempt commodities (collectively, physical commodities). This mandate does not apply to excluded commodities, which are primarily intangible commodities, like financial products.

[712] The Commission's statutory interpretation of its mandate under CEA section 4a(a)(2) is discussed in detail above. A separate provision added by the Dodd-Frank Act directs the Commission with respect to factors to consider in establishing the levels of speculative position limits that are mandated by CEA section 4a(a)(2). *See* CEA section 4a(a)(3); 7 U.S.C. 6a(a)(3).

[713] Specifically, as enumerated these are: (1) contracts listed by DCMs; (2) with respect to FBOTs, contracts that are price-linked to a contract listed for trading on a registered entity and made available from within the United States via direct access; and (3) SPDF Swaps.

[714] *See* Dodd-Frank Act sections 735(b) (amending CEA section 5(d)(5)) and 733 (adding CEA section 5h, subsection (f)(6) of which specifies SEF's core principle obligation with respect to position limitations or accountability).

[715] *See, e.g.,* 46 FR 50938, 50940, Oct. 16, 1981. In this release adopting § 1.61, the Commission articulated its interpretation that the CEA authorized prophylactic speculative position limits. One year later, Congress enacted the Futures Trading Act of 1982, Public Law 97–444, 96 Stat. 2294, 2299–2300(1982), which, *inter alia,* amended the CEA to ''clarify and strengthen the Commission's'' position limits authority. S. Rep. 97–384, at 44 (1982). Congress enacted this strengthening amendment with awareness of the Commission's prophylactic interpretation and approach, and after rejecting amendments that would have circumscribed the Commission's authority. *See, e.g.,* Futures Trading Act of 1982: Hearings on S. 2109 before the S. Subcomm. on Agricultural Research, 97th Cong. 28, 29, 44–45, 337, 340–45 (1982) (oral and written statements of Commission Chair Phillip McBride Johnson and Commodity Exchange Executive Vice Chair Lee Berendt concerning, *inter alia,* the Commission's omnibus approach to position limits); S. Rep. 97–384, at 44–45, 79 (discussing rejected amendments).

[716] As discussed above, the District Court for the District of Columbia vacated part 151 of the Commission's regulations, which would have replaced part 150. As a result, part 150 remains in effect.

[717] *See* Aggregation NPRM.

[718] 7 U.S.C. 19(a).

[719] In *ICI* v. *CFTC,* 2013 WL 3185090, at *8 (D.C. Cir. 2013), the United States Court of Appeals for the D.C. Circuit held that CEA section 15(a) imposes no duty on the Commission to conduct a quantitative economic analysis: ''Where Congress has required '''rigorous, quantitative economic analysis,''' it has made that requirement clear in the agency's statute, but it imposed no such requirement here [in the CEA].'' *Id.* (citation omitted).

[720] Many of the revised or new definitions do not substantively affect the Commission's considerations of costs and benefits on their own merit, but are considered in conjunction with the sections of the rule that implement them.

[721] The proposed rules also include amendments to 17 CFR parts 15 and 17, as discussed *supra.* The Commission preliminarily believes these amendments are not substantive in nature and do not have cost or benefit implications. The Commission welcomes comment on any potential costs or benefits of the changes to parts 15 and 17.

interest considerations of CEA section 15(a).

2. Section 150.1—Definitions

Currently, § 150.1 defines terms for operation within the various rules that comprise part 150. As described above, the Commission proposes formatting, organizational, and other non-substantive amendments to these definitional provisions that, subject to consideration of any relevant comments, it does not view as having benefit or cost implications.[722] But, with respect to a number of definitions, the Commission proposes substantive amendments and additions. With the exception of the term ''bona fide hedging position,'' for which the benefits and costs of the proposed § 150.1 definition are considered in the subsection directly below, any benefits and costs attributable to substantive definitional changes and additions proposed in § 150.1 are considered in the discussion of the rule in which such new or amended terms would be operational.

i. Bona Fide Hedging

Proposed § 150.1 would include a definition of the term ''bona fide hedging positions''—which operates to distinguish hedging positions from those that are speculative and thus subject to position limits, both federal and exchange-set, unless otherwise exempted by the Commission. Hedgers present a lesser risk of burdening interstate commerce as described in CEA section 4a because their positions are offset in the physical market. CEA section 4a(c) has long directed that no Commission rule, regulation or order establishing position limits under CEA section 4a(a) apply to bona fide hedging as defined by the Commission.[723] The proposed definition would replace the definition now contained in § 1.3(z) to implement that statutory directive.[724]

Generally, the current definition of bona fide hedging in § 1.3(z) advises that a position should ''normally represent a substitute for . . . positions to be taken at a later time in a physical marketing channel'' and requires such position to be ''economically appropriate to the reduction of risks in the conduct of a commercial enterprise'' where the risks arise from the potential change in value of assets, liabilities, or services.[725] Such bona fide hedges must have a purpose ''to offset price risks incidental to commercial cash or spot operations'' and must be ''established and liquidated in an orderly manner in accordance with sound commercial practices.''

This general definition thus provides general components of the type of position that constitute a bona fide hedge position. The criterion that such a position should ''normally represent a substitute for . . . positions to be taken at a later time in a physical marketing channel'' has been deemed the ''temporary substitute'' criterion. The requirement that such position be ''economically appropriate to the reduction of risks in the conduct of a commercial enterprise'' is referred to as the ''economically appropriate'' test. The criterion that hedged risks arise from the potential change in value of assets, liabilities, or services is commonly known as the ''change in value'' requirement or test. The phrase ''price risks incidental to commercial cash or spot operations'' has been termed the ''incidental test.'' The criterion that hedges must be ''established and liquidated in an orderly manner'' is known as the ''orderly trading requirement.''[726]

The current definition also describes a non-exclusive list of transactions that satisfy the definitional criteria and therefore qualify as bona fide hedges; these ''enumerated hedging transactions'' are located in § 1.3(z)(2). For those transactions that may fit the definition but are not listed in § 1.3(z)(2), current § 1.3(z)(3) provides a means of requesting relief from the Commission.

The Dodd-Frank Act amended the CEA in ways that require the Commission to adjust its current bona fide hedging definition. Specifically, the Dodd-Frank Act added section 4a(c)(2) of the Act, which the Commission interprets as directing the Commission to narrow the bona fide hedging position definition for physical commodities from the definition found in current § 1.3(z)(1).[727]

Dodd-Frank also provided direction regarding the bona fide hedging criteria for swaps contracts newly under the Commission's jurisdiction. Specifically, new CEA sections 4a(a)(5) and (6) require the Commission to impose limits on an aggregate basis across all economically equivalent contracts, excepting in both cases bona fide hedging positions. CEA section 4a(c)(2)(B) describes which swap offset positions may qualify as bona fide hedges. Finally, new CEA section 4a(a)(7) provides the Commission with authority to grant exemptive relief from position limits. The Commission proposes to amend its definition of bona fide hedging under the authority and direction of amended CEA section 4a(c) and the other provisions added by the Dodd-Frank Act. To the extent a change in the definition represents a statutory requirement, it is not discretionary and thus not subject to CEA section 15(a).

ii. Rule Summary

Like current § 1.3(z), the proposed § 150.1 bona fide hedging definition employs a basic organizational model of stating general, broadly applicable requirements for a hedge to qualify as bona fide,[728] and then specifying certain particular (''enumerated'') hedges that are deemed to meet the general requirements.[729] Generally, the proposed definition is built around the same criteria as are currently found in § 1.3(z), including the temporary substitute and economically appropriate criteria. Thus, the proposed definition is substantially similar to the current definition, with limited changes to accommodate altered statutory requirements regarding bona fide hedging as well as accomplish discretionary improvements. The proposed definition also reflects organizational changes to better accommodate the extension of speculative position limits to all economically equivalent contracts across all trading venues. To the extent the proposed definition carries over requirements currently resident in the § 1.3(z) definition, it does not represent a change from current practice and therefore should not pose incremental benefits or costs.

The proposed definition has been relocated from § 1.3(z) to § 150.1 in order to facilitate reference between sections of part 150. The proposed

[722] *See supra* discussion of proposed amendments to § 150.1.

[723] CEA section 4a(c)(1); 7 U.S.C. 6a(c)(1).

[724] Currently, 17 CFR 1.3(z), defines the term ''bona fide hedging transactions and positions.'' Originally adopted by the newly formed Commission in 1975, a revised version of § 1.3(z) took effect two years later. This 1977 revision largely forms the basis of the current definition of bona fide hedging. A history of the definition of bona fide hedging is presented above. With the adoption of the proposed definition of ''bona fide hedging positions'' in § 150.1, § 1.3(z) would be deleted.

[725] 17 CFR 1.3(z)(1). The Commission cautions that the e-CFR 2012 version of this provision reflects changes made by the now-vacated Part 151 rule.

[726] *See supra* for additional explanation of these terms.

[727] 17 CFR 1.3(z)(1).

[728] *Compare* 17 CFR 1.3(z)(1) (''General Definition'') *with* the proposed § 150.1 definition of bona fide hedging opening sentence and paragraphs (1) and (2) (respectively, ''Hedges of an excluded commodity'' and ''Hedges of a physical commodity'').

[729] *Compare* 17 CFR 1.3(z)(2)(''Enumerated Hedging Transactions'') *with* the proposed § 150.1 definition of bona fide hedging paragraphs (3) and (4) (respectively, ''Enumerated hedging positions'' and ''Other enumerated hedging positions'').

definition of bona fide hedging position is also re-organized into six sections, starting with an opening paragraph describing the general requirements for all hedges followed by five numbered paragraphs. Paragraph (1) of the proposed definition describes requirements for hedges of an excluded commodity,[730] including guidance on risk management exemptions that may be adopted by an exchange. Paragraph (2) describes requirements for hedges of a physical commodity. Paragraphs (3) and (4) describe enumerated exemptions. Paragraph (5) describes cross-commodity hedges.

The following discussion is meant to highlight the essential components of each section of the proposed definition. A full discussion of the history and policy rationale of each section may be found *supra.*[731]

a. Opening Paragraph

The opening paragraph of the proposed definition incorporates the incidental test and the orderly trading requirement, both found in the current § 1.3(z)(1). The Commission intends the proposed incidental test to be a requirement that the risks offset by a commodity derivative contract hedging position must arise from commercial cash market activities. The Commission believes this requirement is consistent with the statutory guidance to define bona fide hedging positions to permit the hedging of ''legitimate anticipated business needs.'' [732] The incidental test allows the Commission to distinguish between hedging and speculate activities by defining the former as requiring a legitimate business need.

The proposed orderly trading requirement is intended to impose on bona fide hedgers the duty to enter and exit the market carefully in the ordinary course of business. The requirement is also intended to avoid to the extent possible the potential for significant market impact in establishing or liquidating a position in excess of position limits. This requirement is particularly important because, as discussed below, the Commission proposes to set the initial levels of position limits at the outer bound of the range of levels of limits that may serve to balance the statutory policy objectives in CEA section 4a(a)(3) for limit levels. As such, bona fide hedgers likely would only need an exemption for very large positions. The orderly trading requirement is intended to prevent disorderly trading, practices, or conduct from bona fide hedgers by encouraging market participants to assess market conditions and consider how the trading practices and conduct affect the orderly execution of transactions when establishing or liquidating a position greater than the applicable position limit.[733]

b. Paragraph (1) Hedges of an Excluded Commodity

The first paragraph in the proposed definition addresses hedging of an excluded commodity; it emanates from the Commission's discretionary authority to impose limits on intangible commodities. In general, in addition to the requirements in the opening paragraph, proposed paragraph (1) requires the position meet the economically appropriate test and is either enumerated in paragraphs (3), (4), or (5) of the proposed definition or is recognized by a DCM or SEF as a bona fide hedge pursuant to exchange rules. The temporary substitute and change in value criteria are not included in the proposed paragraph (1), as these requirements are inappropriate in the context of certain excluded commodities that lack a physical marketing channel.[734]

Exclusively addressed to excluded commodity hedging, paragraph (1) is relevant only for the purposes of exchange-set limits under § 150.5 as proposed for amendment. As the Commission has determined to focus the application of federal speculative position limits on 28 physical commodities and their related physical-delivery and cash-settled referenced contracts, this paragraph does not affect the imposition of federal speculative position limits and exemptions thereto.

c. Paragraph (2) Hedges of a Physical Commodity

Proposed paragraph (2) of the definition enumerates what constitutes a hedge for physical commodities, including physical agricultural and exempt commodities both subject and not subject to federal speculative position limits. In addition to the requirements in the opening paragraph, proposed paragraph (2) requires that the position satisfy the temporary substitute test, the economically appropriate test, and the change-in-value test. These tests have been incorporated into the revised statutory definition in CEA section 4a(c)(2) and essentially mirror the current definition in § 1.3(z).[735] The proposed paragraph (2) also requires the position either be enumerated in proposed paragraphs (3), (4), or (5) or be a pass-through swap offset or pass-through swap position as defined in paragraph (2)(ii).

Proposed paragraph (2) of the definition applies generally to derivative positions that hedge a physical commodity and as such includes swaps. Thus, the paragraph responds to the statutory requirement in CEA section 4a(a)(5) that the Commission establish limits on economically equivalent contracts, including swaps, excluding bona fide hedging positions. The definition of a pass-through swap offset position incorporates the definition in new CEA section 4a(c)(2)(B)(i), with the inclusion of the requirement that such position not be maintained during the lesser of the last five days of trading or the time period for the spot month for the physical-delivery contract.

d. Paragraphs (3) and (4) Enumerated Hedging Positions

Proposed paragraph (3) lists specific positions that would fit under the definition of a bona fide hedging position, including hedges of inventory, cash commodity purchase and sales contracts, unfilled anticipated requirements, and hedges by agents.[736] Each of these positions was described in § 1.3(z), with the exception of paragraph (iii)(B), which was added in response to the petition submitted to the Commission by the Working Group of Commercial Energy Firms.[737]

Proposed paragraph (4) provides other enumerated hedging exemptions, including hedges of unanticipated production, offsetting unfixed price cash commodity sales and purchases, anticipated royalties, and services, all of which are subject to the ''five-day rule.'' The ''five-day rule'' is a provision in many of the enumerated hedging positions that prohibits a trader from maintaining the positions in any physical-delivery commodity derivative

[730] An ''excluded commodity'' is defined in CEA section 1a(19). The definition includes financial products such as interest rates, exchange rates, currencies, securities, credit risks, and debt instruments as well as financial events or occurrences.

[731] *See* discussion above.

[732] 7 U.S.C. 6a(c)(1).

[733] As discussed *supra,* the Commission believes that negligent trading, practices, or conduct should be a sufficient basis for the Commission to deny or revoke a bona fide hedging exemption.

[734] The Commission notes that DCMs currently incorporate the temporary substitute and change in value criteria when the contract's underlying market has physical delivery obligations. The proposal would not limit their ability to continue to do so when appropriate.

[735] With respect to the temporary substitute test, the word ''normally'' has been removed in the proposed definition in order to conform with the stricter statutory standard in new CEA section 4a(c)(2). *See* discussion above.

[736] A detailed description of each enumerated position can be found *supra.*

[737] *See* discussion above.

contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract.[738] Because each exemption shares this provision, the Commission is proposing to reorganize such exemptions into proposed paragraph (4) for administrative efficiency.

Of the enumerated hedges in proposed paragraphs (4)(i) and (ii) are currently in § 1.3(z) and paragraph (4)(iv) codifies a hedge that has historically been recognized by the Commission. Paragraph (4)(iii) proposes a royalties exemption not now specified in § 1.3(z).

e. Paragraph (5) cross-commodity hedges

Proposed paragraph (5) describes positions that would qualify as cross-commodity bona fide hedges. The Commission has long recognized cross-commodity hedging, stating in 1977 that such positions would be covered under the general provisions of § 1.3(z)(2).

The definition in proposed paragraph (5) would condition cross-commodity hedging on: (i) whether the fluctuations in value of the position in the commodity derivative contract are ''substantially related'' to the fluctuations in value of the actual or anticipated cash position or pass-through swap; and (ii) the five-day rule being applied to positions in any physical-delivery commodity derivative contract. The second condition, *i.e.* the application of the five-day rule, would help to protect the integrity of the delivery process in the physical-delivery contract but would not apply to cash-settled contract positions.[739]

iii. Benefits and Costs

Elements of the proposed definition that represent discretionary, substantive modifications to the required manner in which bona fide hedging have been defined under § 1.3(z) include the following: [740] (i) Proposing requirements for hedges in an excluded commodity in proposed paragraph (1); (ii) adding the five-day rule into the statutory definition of pass-through swap as described in paragraph (2)(ii)(A); (iii) applying the definition in proposed paragraph (2) to positions in economically equivalent contracts in a physical commodity; [741] (iv) expanding paragraph (3)(III)(b) to incorporate hedges encouraged by a public utility commission; (v) expanding paragraph (4)(ii) to include offsetting unfixed-price cash commodity sales and purchases that are basis different contracts in the same commodity, regardless of whether the contracts are in the same calendar month; (vi) adding paragraph (iii) to proposed paragraph (4) to enumerate anticipated royalty hedges; and (vii) enumerating cross-commodity hedges as a standalone provision in paragraph (5).

a. Benefits

The Commission proposes the definition for excluded commodities in paragraph (1) in order to provide a consistent definition of bona fide hedging—*i.e.,* a definition that incorporates the economically appropriate test—for all commodities under the Commission's jurisdiction. The addition of paragraph (1) would provide exchanges with a definition for bona fide hedging designed to provide a level of assurance that the Commission's policy objectives regarding bona fide hedging are met at the exchange level as well as at the federal level, and for excluded commodities as well as agricultural and exempt commodities.

The Commission believes that the additions to the definition of bona fide hedging proposed in this release provide additional necessary relief to bona fide hedgers. This relief, in turn, will help to ensure that market participants with positions hedging legitimate business needs are properly recognized as hedgers under the Commission's speculative position limits regime. Thus, the Commission anticipates that the addition of the enumerated position for anticipated royalties and the expansion of the enumerated unfilled anticipated requirements position provide additional means for obtaining a hedge exemption by recognizing the legitimate business need in each position. The safe harbor proposed in paragraph (5) is expected to provide clarity and promote regulatory certainty for entities that use cross-commodity hedging strategies. Further, the addition of the five-day rule to the hedging definition for pass-through swaps helps the Commission to ensure the integrity of the delivery process in the physical-delivery contract and as a result to accomplish to the maximum extent practicable the factors in CEA section 4a(a)(3). Finally, the Commission believes using the same bona fide hedging exemptions in economically equivalent contracts may facilitate administrative efficiency by avoiding the need for market participants to manage and apply different definitional criteria across multiple products and trading venues.[742] The Commission requests comment on its consideration of the benefits of the proposed definition of bona fide hedging. Has the Commission misidentified any of the benefits of the proposed rule? Are there additional benefits the Commission ought to consider regarding the proposed definition of bona fide hedging? Why or why not?

b. Costs

The Commission anticipates that there will be some small additional costs associated with the proposed definition.

Entities may incur costs to the extent the proposed definition of a bona fide hedging position in an excluded commodity requires an exchange to adjust its policies for bona fide hedging exemptions or a market participant to adjust its trading strategies for what is and is not a bona fide hedge in an excluded commodity. The Commission expects such costs to be negligible, as the definition is substantially the same as the current definition under § 1.3(z). Costs for exchanges are also considered in the section of this release that discusses the proposed amendments to § 150.5.

In general, under other aspects of the Commission's proposed definition, market participants may incur costs to determine whether their positions fall under one of the new or expanded enumerated positions. In the event a position does not fit under any of the enumerated positions, market

[738] As discussed *above,* the purpose of the five-day rule is to protect the integrity of the delivery and settlement processes in physical-delivery contracts. Without this rule, high concentrations of exempted positions can distort the markets, impairing price discovery while potentially having an adverse impact on efforts to deter all forms of market manipulation and diminish excessive speculation.

[739] *See* discussion above.

[740] The Commission notes that the relocation of the definition from § 1.3(z) to part 150 is also discretionary. As noted above, the placement is intended to facilitate compliance with the other sections of part 150; the Commission does not believe, however, that this action has substantive cost or benefit implications. Also, the proposed definition incorporates and references elements of non-binding guidance not encompassed by CEA section 15(a).

[741] As discussed *supra,* CEA section 4a(a)(5) requires that the Commission set speculative limits on the amount of positions, ''other than bona fide hedging positions . . . held by any person with respects to swaps that are economically equivalent'' to futures and options. 7 U.S.C. 6a(a)(5). Subject to CEA section 4a(a)(2), the Commission is exercising its discretion in defining bona fide hedging in economically equivalent contracts in the same manner as for futures and options in physical commodities. 7 U.S.C. 6a(a)(2).

[742] Further, using the same exemptions in economically equivalent contracts is consistent with the approach of the Dodd-Frank Act section 737(a) amendment requiring that the Commission establish limits for economically equivalent swap positions and across trading venues, including direct-access linked FBOT contracts. *See* 7 U.S.C. 6a(a)(5)–(6).

participants may incur costs associated with filing for exemptive relief as described in the section discussing the costs of proposed § 150.3 or in altering speculative trading strategies as discussed above. As trading strategies are proprietary, and the determinations made by individual entities present a burden that is highly idiosyncratic, it is not reasonably feasible for the Commission to estimate the value of the burden imposed.

c. Request for Comment

The Commission requests comment on its consideration of the costs of the proposed definition of bona fide hedging position. Are there additional costs related to the Commission's discretionary actions that the Commission should consider? Has the Commission misidentified any costs? Commenters are encouraged to submit any data that the Commission should consider in evaluating the costs of the proposed definition.

d. Consideration of Alternatives

The Commission recognizes that alternatives exist to discretionary elements of the definition of bona fide hedging positions proposed herein. The Commission requests comments on whether an alternative to what is proposed would result in a superior benefit-cost profile, with support for any such position provided.

3. Section 150.2—Limits

i. Rule Summary

As previously discussed, the Commission interprets CEA section 4a(a)(2) to mandate that it establish speculative position limits for all agricultural and exempt physical commodity derivative contracts.[743] The Commission currently sets and enforces speculative position limits for futures and futures-equivalent options contracts on nine agricultural products. Specifically, current § 150.2 provides ''[n]o person may hold or control positions, separately or in combination, net long or net short, for the purchase or sale of a commodity for future delivery or, on a futures-equivalent basis, options thereon, in excess of'' enumerated spot, single-month, and all-month levels for nine specified contracts.[744] These proposed amendments to § 150.2 would expand the scope of federal position limits regulation in three chief ways: (1) specify limits on 19 contracts in addition to the nine existing legacy contracts (*i.e.,* a total of 28); (2) extend the application of these limits beyond futures and futures-equivalent options to all commodity derivative interests, including swaps; and (3) extend the application of these limits across trading venues to all economically equivalent contracts that are based on the same underlying commodity. In addition, the proposed rule would provide a methodology and procedures for implementing and applying the expanded limits.

The Commission proposes to amend § 150.2 to impose speculative position limits as mandated by Congress in accordance with the statutory bounds that define its discretion in doing so. First, pursuant to CEA section 4a(a)(5) the Commission must concurrently impose position limits on swaps that are economically equivalent to the agricultural and exempt commodity derivatives for which position limits are mandated in section 4a(a)(2). Second, CEA section 4a(a)(3) requires that the Commission appropriately set limit levels mandated under section 4a(a)(2) that ''to the maximum extent practicable, in its discretion,'' accomplish four specific objectives.[745] Third, CEA section 4a(a)(2)(C) requires that in setting limits mandated under section 4a(a)(2)(A), the ''Commission shall strive to ensure that trading on foreign boards of trade in the same commodity will be subject to comparable limits and that any limits . . . imposed . . . will not cause price discovery in the commodity to shift to trading on the foreign boards of trade.'' Key elements of the proposed rule are summarized below.[746]

Generally, proposed § 150.2 would limit the size of speculative positions,[747] *i.e.,* prohibit any person from holding or controlling net long/short positions above certain specified spot month, single month, and all-months-combined position limits. These position limits would reach: (1) 28 ''core referenced futures contracts,'' [748] representing an expansion of 19 contracts beyond the 9 legacy agricultural contracts identified currently in § 150.2; [749] (2) a newly defined category of ''referenced contracts'' (as defined in proposed § 150.1); [750] and (3) across all trading venues to all economically equivalent contracts that are based on the same underlying commodity.

a. § 150.2(a) Spot-Month Speculative Position Limits

In order to implement the statutory directive in CEA section 4a(a)(3)(A), proposed § 150.2(a) would prohibit any person from holding or controlling positions in referenced contracts in the spot month in excess of the level specified by the Commission for referenced contracts.[751] Proposed § 150.2(a) would require, in the Commission's discretion, that a trader's positions, net long or net short, in the physical-delivery referenced contract and cash-settled referenced contract be

[743] *See supra* discussion of the Commission's interpretation of this mandate.

[744] These contracts are Chicago Board of Trade corn and mini-corn, oats, soybeans and mini-soybeans, wheat and mini-wheat, soybean oil, and soybean meal; Minneapolis Grain Exchange hard red spring wheat; ICE Futures U.S. cotton No. 2; and Kansas City Board of Trade hard winter wheat.

[745] These objectives are to: (1) ''diminish, eliminate, or prevent excessive speculation;'' (2) ''deter and prevent market manipulation, squeezes, and corners;'' (3) ''ensure sufficient market liquidity for bona fide hedgers;'' and (4) ''ensure that the price discovery function of the underlying market is not disrupted.'' 7 U.S.C. 6a(a)(3).

[746] For a more detailed description, *see* discussion above.

[747] Proposed § 150.1 would include a consistent definition of the term ''speculative position limits.''

[748] Proposed § 150.1 also would define the term ''core referenced futures contract'' by reference to ''a futures contract that is listed in § 150.2(d).''

[749] Specifically, in addition to the existing 9 legacy agricultural contracts now within § 150.2—*i.e.,* Chicago Board of Trade corn, oats, soybeans, soybean oil, soybean meal, and wheat; Minneapolis Grain Exchange hard red spring wheat; ICE Futures U.S. cotton No. 2; and Kansas City Board of Trade hard winterwheat—proposed § 150.2 would expand the list of core referenced futures contracts to capture the following additional agricultural, energy, and metal contracts: Chicago Board of Trade Rough Rice; ICE Futures U.S. Cocoa, Coffee C, FCOJ–A, Sugar No. 11 and Sugar No. 16; Chicago Mercantile Exchange Feeder Cattle, Lean Hog, Live Cattle and Class III Milk; Commodity Exchange, Inc., Gold, Silver and Copper; and New York Mercantile Exchange Palladium, Platinum, Light Sweet Crude Oil, NY Harbor ULSD, RBOB Gasoline and Henry Hub Natural Gas.

[750] This would result in the application of prescribed position limits to a number of contract types with prices that are or should be closely correlated to the prices of the 28 core referenced futures contracts—*i.e.,* economically equivalent contracts—including: (1) ''look-alike'' contracts (*i.e.,* those that settle off of the core referenced futures contract and contracts that are based on the same commodity for the same delivery location as the core referenced futures contract); (2) contracts based on an index comprised of one or more prices for the same delivery location and in the same or substantially the same commodity underlying a core referenced futures contract; and (3) inter-commodity spreads with two components, one or both of which are referenced contracts. The proposed ''reference contract'' definition would exclude, however, a guarantee of a swap.

[751] As discussed *supra,* the Commission proposes to adopt a streamlined, amended definition of ''spot month'' in proposed § 150.1. The term would be defined as the trading period immediately preceding the delivery period for a physical-delivery futures contract and cash-settled swaps and futures contracts that are linked to the physical-delivery contract. The definition proposes similar but slightly different language for cash-settled contracts, providing for the spot month to be the earlier of the period in which the underlying cash-settlement price is calculated or the close of trading on the trading day preceding the third-to-last trading day, until the contract cash-settlement price is determined. For more details, *see* discussion above.

calculated separately under the spot month position limits fixed by the Commission for each. As a result, a trader could hold positions up to the applicable spot month limit in the physical-delivery contracts, as well as positions up to the applicable spot month limit in cash-settled contracts (*i.e.,* cash-settled futures and swaps), but would not be able to net across physical-delivery and cash-settled contracts in the spot month.

b. § 150.2(b) Single-Month and All-Months-Combined Speculative Position Limits

Proposed § 150.2(b) would provide that no person may hold or control positions, net long or net short, in referenced contracts in a single-month or in all-months-combined in excess of the levels specified by the Commission. Proposed § 150.2(b) would require netting all positions in referenced contracts (regardless of whether such referenced contracts are physical-delivery or cash-settled) when calculating a trader's positions for purposes of the proposed single-month or all-months-combined position limits (collectively ''non-spot-month'' limits).[752]

c. § 150.2(d) Core Referenced Futures Contracts

To be clear, the statutory mandate in Dodd-Frank section 4a(a)(2) applies on its face to all physical commodity contracts. The Commission is nevertheless proposing, initially, to apply speculative position limits to referenced contracts that are based on 28 core referenced futures contract listed in proposed § 150.2(d). As defined in proposed § 150.1, referenced contracts are futures, options, or swaps contracts that are directly or indirectly linked to a core referenced futures contract or the commodity underlying a core referenced futures contract.[753]

Proposed § 150.2(d) lists the 28 core referenced futures contracts on which the Commission is initially proposing to establish federal speculative position limits. The list represents a significant expansion of federal speculative position limits from the current list of nine agricultural contracts under current part 150.[754] The Commission has selected these important food, energy, and metals contracts on the basis that such contracts (i) have high levels of open interest and significant notional value and/or (ii) serve as a reference price for a significant number of cash market transactions. Thus, the Commission is proposing limits to commence the expansion of its federal position limit regime with those commodity derivative contracts that it believes are likely to have the greatest impact on interstate commerce. Because the mandate applies to all physical commodity contracts, the Commission intends through supplemental rulemaking to establish limits for all other physical commodity contracts. Given limited Commission resources, it cannot do so in this initial rulemaking.

As discussed above,[755] the Commission calculated the notional value of open interest (delta-adjusted) and open interest (delta-adjusted) for all futures, futures options, and significant price discovery contracts as of December 31, 2012 in all agricultural and exempt commodities in order to select the list of 28 core referenced futures contracts in proposed § 150.2(d). The Commission selected commodities in which the derivative contracts had largest notional value of open interest and open interest for three categories: agricultural, energy, and metals. The Commission then designated the benchmark futures contracts for each commodity as the core referenced futures contracts for which position limits would be established. Proposed § 150.2(d) lists 19 core referenced futures contracts for agricultural commodities, four core referenced futures contracts for energy commodities, and five core referenced futures contracts for metals commodities.

d. § 150.2(e) Levels of Speculative Position Limits

The Commission proposes setting initial spot month position limit levels for referenced contracts at the existing DCM-set levels for the core referenced futures contracts. Thereafter, proposed § 150.2(e)(3) would task the Commission with recalibrating spot month position limit levels no less frequently than every two calendar years. The Commission's proposed recalibration would result in limits no greater than one-quarter (25 percent) of the estimated spot-month deliverable supply [756] in the relevant core referenced futures contract. This formula is consistent with the acceptable practices in current § 150.5, as well as the Commission's longstanding practice of using this measure of deliverable supply to evaluate whether DCM-set spot-month limits are in compliance with DCM core principles 3 and 5. The proposed rules separately restrict the size of positions in cash-settled referenced contracts that would potentially benefit from a trader's potential distortion of the price of the underlying core referenced futures contract.

As proposed, each DCM would be required to supply the Commission with an estimated spot-month deliverable supply figure that the Commission would use to recalibrate spot-month position limits unless it decides to rely on its own estimate of deliverable supply instead.[757]

In contrast to spot-month limits, which would be set as a function of deliverable supply, the proposed formula for the non-spot-month position limits is based on total open interest for all referenced contracts that are aggregated with a particular core referenced contract. Proposed § 150.2(e)(4) explains that the Commission would calculate non-spot-month position limit levels based on the following formula: 10 percent of the largest annual average open interest for the first 25,000 contracts and 2.5 percent of the open interest thereafter.[758] As is the case with spot month limits, the Commission proposes to adjust single month and all-months-combined limits no less frequently than every two calendar years.

The Commission's proposed average open interest calculation would be computed for each of the past two calendar years, using either month-end open contracts or open contracts for each business day in the time period, as practical and in the Commission's discretion. Initially, the Commission proposes to set the levels of initial non-spot-month limits using open interest

[752] The Commission proposes to use the same level for single-month and all-months-combined limits, and refers to those limits as the ''non-spot-month limits.'' The spot month and any single month refer to those periods of the core referenced futures contract.

[753] As discussed *above,* the definition of referenced contract excludes any guarantee of a swap, basis contracts, and commodity index contracts.

[754] 17 CFR 150.2.

[755] *See* discussion above.

[756] The guidance for meeting DCM core principle 3 (as listed in 17 CFR part 38 app. C) specifies that, ''[t]he specified terms and conditions [of a futures contract], considered as a whole, should result in a 'deliverable supply' that is sufficient to ensure that the contract is not susceptible to price manipulation or distortion. In general, the term 'deliverable supply' means the quantity of the commodity meeting the contract's delivery specifications that reasonably can be expected to be readily available to short traders and salable by long traders at its market value in normal cash marketing channels . . .'' *See* 77 FR 36612, 36722, Jun. 19, 2012.

[757] Proposed § 150.2(e)(3)(ii) would require DCMs to submit estimates of deliverable supply. DCM estimates of deliverable supplies (and the supporting data and analysis) would continue to be subject to Commission review.

[758] Since 1999, the same 10 percent/2.5 percent methodology, now incorporated in current § 150.5(c)(2), has been used to determine futures all-months position limits for referenced contracts.

for calendar years 2011 and 2012 in futures contracts, options thereon, and in swaps that are significant price discovery contracts and are traded on exempt commercial markets. Using the 2011/2012 combined levels of open interest for futures contracts and for swaps that are significant price discovery contracts and are traded on exempt commercial markets will result in non-spot month position limit levels that are not overly restrictive at the outset; this is intended to facilitate the transition to the new position limits regime without disrupting liquidity. For example, the Commission is proposing a non-spot-month limit for CBOT Wheat that represents the harvest from around 2 million acres (3,125 square miles) of wheat, or 81 million bushels. The proposed non-spot-month limit for NYMEX WTI Light Sweet Crude Oil represents 109.2 million barrels of oil. The Commission believes these levels to be sufficiently high as to restrict excessive speculation without restricting the benefits of speculative activity, including liquidity provision for bona fide hedgers.

After the initial non-spot-month limits are set, the Commission proposes subsequently to use the data reported by DCMs and SEFs pursuant to parts 16, 20, and/or 45 to estimate average open interest in referenced contracts.[759]

e. § 150.2(f)–(g) Pre-Existing Positions and Positions on Foreign Boards of Trade

The Commission proposes in new § 150.2(f)(2) to exempt from federal non-spot-month speculative position limits any referenced contract position acquired by a person in good faith prior to the effective date of such limit, provided that the pre-existing position is attributed to the person if such person's position is increased after the effective date of such limit.[760]

Finally, proposed § 150.2(g) would apply position limits to positions on foreign boards of trade (''FBOT''s) provided that positions are held in referenced contracts that settle to a referenced contract and that the FBOT allows direct access to its trading system for participants located in the United States.

ii. Benefits

The criteria set out in CEA section 4a(a)(3)(B)—namely, that position limit levels (1) ''diminish, eliminate, or prevent excessive speculation;'' (2) ''deter and prevent market manipulation, squeezes, and corners;'' (3) ''ensure sufficient market liquidity for bona fide hedgers;'' and (4) ''ensure that the price discovery function of the underlying market is not disrupted''—clearly articulate objectives that Congress intended the Commission to accomplish, to the maximum extent practicable, in setting limit levels in accordance with the mandate to impose limits. The Commission is proposing to expand its speculative position limits regime to include all commodity derivative interests, including swaps; to impose federal limits on 19 additional contract markets; and to apply limits across trading venues to all economically equivalent contracts that are based on the same underlying commodity.

In so doing, the proposed rules generally would expand the prophylactic protections of federal position limits to additional contract markets. Proposed § 150.2(f) and (g) implement statutory directives in CEA section 4a(b)(2) and CEA section 4a(a)(6)(B), respectively, and are not acts of the Commission's discretion. Thus, the Commission is not required to consider costs and benefits of these provisions under CEA section 15(a). Specific discussion of the benefits of the other components of proposed § 150.2 is below.

a. § 150.2(a) Spot-Month Speculative Position Limits

As discussed above, CEA section 4a(a)(3)(A) now directs the Commission to set limits on speculative positions during the spot-month.[761] It is during the spot-month period that concerns regarding certain manipulative behaviors, such as corners and squeezes, become most urgent.[762] Spot-month position limits cap speculative traders' positions, and therefore restrict their ability to amass market power. In so doing, spot-month limits restrict the ability of speculators to engage in corners and squeezes and other forms of manipulation. They also prevent the potential adverse impacts of unduly large positions even in the absence of manipulation, thereby promoting a more orderly liquidation process for each contract.

The Commission has used its discretion in the manner in which it implements the statutorily-required spot-month position limits so as to achieve Congress's objectives in CEA section 4a(a)(3)(B)(ii) to prevent or deter market manipulation, including corners and squeezes. For example, the Commission has used its discretion under CEA section 4a(a)(1) to set separate but equal limits in the spot-month for physical-delivery and cash-settled referenced contracts. By setting separate limits for physical-delivery and cash-settled referenced contracts, the proposed rule restricts the size of the position a trader may hold or control in cash-settled reference contracts, thus reducing the incentive of a trader to manipulate the settlement of the physical-delivery contract in order to benefit positions in the cash-settled reference contract. Thus, the separate limits further enhance the prevention of market manipulation provided by spot-month position limits by reducing the potential for adverse incentives to manifest in manipulative action.

b. § 150.2(b) Single-Month and All-Months-Combined Speculative Position Limits

CEA section 4a(a)(3)(A) further directs the Commission to set limits on speculative positions for months other than the spot-month.[763] While market disruptions arising from the concentration of positions remain a possibility outside the spot month, the above-mentioned concerns about corners and squeezes and other forms of manipulation are reduced because the potential for the same is reduced outside the spot-month. Accordingly, the Commission has proposed to use its discretion to require netting of physical-delivery and cash-settled referenced contracts for purposes of determining compliance with non-spot-month limits. The Commission deems it is appropriate to provide traders with additional flexibility in complying with the non-spot-months limits given their decreased risk of corners and squeezes. Because this additional flexibility means market participants are able to retain offsetting positions outside of the spot-month, liquidity should not be

[759] Options listed on DCMs would be adjusted using an option delta reported to the Commission pursuant to 17 CFR part 16; swaps would be counted on a futures equivalent basis, equal to the economically equivalent amount of core referenced futures contracts reported pursuant to 17 CFR part 20 or as calculated by the Commission using swap data collected pursuant to 17 CFR part 45.

[760] *See also* the definition of the term ''Pre-existing position'' incorporated in proposed § 150.1 herein. Such pre-existing positions that are in excess of the proposed position limits would not cause the trader to be in violation based solely on those positions. To the extent a trader's pre-existing positions would cause the trader to exceed the non-spot-month limit, the trader could not increase the directional position that caused the positions to exceed the limit until the trader reduces the positions to below the position limit. As such, persons who established a net position below the speculative limit prior to the enactment of a regulation would be permitted to acquire new positions, but the total size of the pre-existing and new positions may not exceed the applicable limit.

[761] 7 U.S.C. 6a(a)(3)(A).

[762] *See* discussion above.

[763] 7 U.S.C. 6a(a)(3)(A).

impaired and price discovery should not be disrupted.

c. § 150.2(e) Levels of Speculative Position Limits

The proposed methodology for determining the levels at which the limits are set is consistent with the Commission's longstanding acceptable practices for DCM-set speculative position limits. Further, the Commission's proposal to set initial spot-month limits at the current federal or DCM-set levels for each core referenced futures contract means that any trading activity that is compliant with the current position limits regime generally will continue to be compliant under the first two years of the proposed rule.[764]

The proposed rule is designed to result in speculative position limit levels that prevent excessive speculation and deter market manipulation without diminishing market liquidity. Specifically, levels that are too low may be binding and overly restrictive, but levels that are too high may not adequately protect against manipulation and excessive speculation. The Commission believes that both standards—*i.e.,* spot month limits of not greater than 25 percent of deliverable supply and the 10 and 2.5 percent formula for non-spot-month limits—produce levels for speculative position limits that help to ensure that both policy objectives—to deter market manipulation and excessively large speculative positions and to maintain adequate market liquidity—are achieved to the maximum extent practicable.

The Commission's review of the number of potentially affected traders indicates that the proposed rule will not significantly affect market liquidity. Over the last two full years (2011–2012), an average of fewer than 40 traders in any one of the 28 proposed markets exceeded just 60 percent of the level of the proposed spot-month position limit. An average of fewer than 10 of those traders exceeded 100 percent of the proposed level of the spot-month limit.[765] In several months over the period, no trader exceeded the proposed level of the spot-month limits and some months saw a much larger number of traders with positions in excess of the proposed level of the spot-month limits. Smaller numbers were revealed when observing traders' positions in relation to proposed levels for non-spot-month position limits—an average of fewer than 10 traders exceeded 60 percent of the proposed all-months-combined limit. The analysis reviewed by the Commission does not account for hedging and other exemptions, which leads the Commission to believe that the number of speculative traders in excess of the proposed limit is even smaller. The relatively low number of traders that may exceed proposed limits in non-spot-months is indicative of the flexibility of the limit formula to account for changes in market participation.

d. Request for Comment

The Commission welcomes comment on its considerations of the benefits of proposed § 150.2. What other benefits of the provisions in § 150.2 should the Commission consider? Has the Commission accurately identified the potential benefits of the proposed rules?

iii. Costs

The expansion of § 150.2 will necessarily create some additional compliance costs for market participants. The Commission has attempted, where feasible, to reduce such burdens without compromising its policy objectives.

a. § 150.2(a)–(b) Spot-Month, Single-Months, and All-Months-Combined Speculative Position Limits; Other Considerations

Notwithstanding the above analysis of potentially affected traders, the Commission anticipates that some market participants still may find it necessary to reassess and modify existing trading strategies in order to comply with spot- and non-spot-month position limits for the 28 commodities with applicable federal limits, though the Commission believes much of these costs to be the direct result of the statutory mandate to impose limits. The Commission anticipates any such costs would be largely incurred by swaps-only entities, as futures and options market participants have experience with position limits, particularly in the spot-month, such that the costs of any strategic or trading changes that needed to be made may have already been incurred. These costs are not reasonably quantifiable by the Commission, due to their highly variable and entity-specific nature, and because trading strategies are proprietary, but to the extent an expanded position limits regime alters the ways a trader conducts speculative trading activity, such costs may be incurred.

Broadly speaking, imposing position limits raises the concerns that liquidity and price discovery may be diminished, because certain market segments, *i.e.,* speculative traders, are restricted. The Commission has endeavored to mitigate concerns about liquidity and price discovery, as well as costs to market participants, by expanding limits to additional markets incrementally in order to facilitate the transition to the expanded position limits regime. For example, the Commission has proposed to adopt current spot-month limit levels as the initial levels in order to ensure traders know well in advance of the effective date of the rule what limits will be on that date. The Commission also expects a large number of swaps traders to avail themselves of the pre-existing position exemption as defined in proposed § 150.3. As preexisting positions are replaced with new positions, traders will be able to incorporate an understanding of the new regime into existing and new trading strategies, which allows the burden of altering strategies to happen incrementally over time. The preexisting position exemption applies to non-spot-month positions entered into in good faith prior to (i) the enactment of the Dodd-Frank Act or (ii) the effective date of this proposed rule.

Implementing the statutory requirement of CEA section 4a(a)(6), the aggregate limits proposed in § 150.2 would impact, as described above, market participants who are active across trading venues in economically equivalent contracts. Under current practice, speculative traders may hold positions up to the limit in each derivative product for which a limit exists. In contrast, aggregate limits cap all of a speculative market participant's positions in derivatives contracts for a particular commodity. In some circumstances, the aggregate limit will prevent traders from entering into positions that would have otherwise been permitted without aggregate limits.[766] The proposed rule incorporates features that provide

[764] The Commission notes that the CME Group submitted an estimate of deliverable supply that, if used by the Commission as a base for setting initial levels of spot month limits, would result in higher spot month limits than those currently proposed in appendix D. *See* discussion above for more information.

[765] To put this figure in context, over the same period the number of unique owners over at least one of the proposed limit levels in the 28 proposed markets was 384, while 932 unique owners were over 60 percent of at least one of the proposed limit levels. In contrast, under the large trader reporting provisions of part 17, there are thousands of traders with reportable positions as defined in § 15.00(p).

[766] For example, a market participant has a position close to the spot-month limit in the NYMEX cash-settled crude oil contract is currently able to take the same size position in the ICE cash-settled crude oil contract. The proposed rule would, in accordance with the statutory requirement of CEA section 4a(a)(6), require that the positions on NYMEX and ICE be aggregated for the purposes of complying with the limit—effectively halving the limit.

counterbalancing opportunities for speculative trading.

First, the limits apply separately to physical-delivery and cash-settled contracts in the spot-month. Physical-delivery core referenced futures contracts have one limit; cash-settled reference contracts traded on the same exchange, a different exchange, or over-the-counter have a separate, but equal, limit. Therefore, a speculative trader may hold positions up to the spot month limit in both the physical-delivery core referenced futures contract, and a cash-settled contract (*i.e.,* cash-settled future and/or swap).

The second feature is the proposed conditional spot-month limit exemption. As discussed in a subsequent section of this release, the conditional spot-month limit exemption allows a speculative trader to hold a position in a cash-settled contract that is up to five times the spot-month limit of the core referenced futures contract, provided that trader does not hold any position in the physical-delivery core referenced futures contract.

Finally, federal non-spot-month limits are calculated as a fixed ratio of total open interest in a particular commodity across all markets for referenced contracts. Because of this feature of the Commission's formula for calculating non-spot-month limit levels and of the proposed rule's application of non-spot-month limits on an aggregate basis across all markets, the imposition of the required aggregate limits should not unduly impact positions outside of the spot-month, as evidenced by the relatively few number of traders that would have been impacted historically, noted in table 11, *supra.*

b. § 150.2(e) Levels of Speculative Position Limits

Market participants would incur costs to monitor positions to prevent a violation of the limit level. The Commission expects that large traders in the futures and options markets for the 28 core referenced futures contracts have already developed some system to control the size of their positions on an intraday basis, in compliance with the longstanding position limits regimes utilized by both the Commission on a federal level and DCMs on an exchange level and in light of industry practices to measure, monitor, and control the risk of positions. For these traders, the Commission anticipates a small incremental burden to accommodate any physical commodity swap positions that such traders may hold that would become subject to the position limits regime. The Commission, subject to evidence establishing the contrary, believes the burden will be minimal because futures and options market participants are currently monitoring trading to track, among other things, their positions vis-à-vis current limit levels. For those participating in the futures and options markets, the Commission estimates two to three labor weeks to adjust monitoring systems to track position limits for referenced contracts, including swaps and other economically equivalent contracts traded on other trading venues. Assuming an hourly wage of $120,[767] multiplied by 120 hours, this implementation cost would amount to approximately $14,000 per entity.

The incremental costs of compliance with the proposed rule would be higher for speculative traders who have until now traded only or primarily in swap contracts.[768] Specifically, swaps-only traders may potentially incur larger start-up costs to develop a compliance system to monitor their positions in referenced contracts and to comply with an applicable position limit. Though swaps-only market participants have not historically been subject to position limits, swap dealers and major swap participants (as defined by the Commission pursuant to the Dodd-Frank Act) are required in § 23.601 to implement systems to monitor position limits.[769] In addition, many of these entities have already developed systems or business processes to monitor or control the size of swap positions for a variety of business reasons, including (i) managing counterparty credit risk exposure; and (ii) limiting and monitoring the risk exposure to such swap positions. Such existing systems would likely make compliance with position limits significantly less burdensome, as they may be able to leverage current monitoring procedures to comply with this rule. The Commission anticipates that a firm could select from a wide range of compliance systems to implement a monitoring regime. This flexibility allows the firm to tailor the system to suit its specific needs in a cost-effective manner.

In the release adopting now-vacated part 151, the Commission recognized the potentially firm-specific and highly variable nature of implementing monitoring systems. In particular, the Commission presented estimates of, on average, labor costs per entity ranging from 40 to 1,000 hours, $5,000 to $100,000 in five-year annualized capital/start-up costs, and $1,000 to $20,000 in annual operating and maintenance costs.[770] The Commission explained that costs would likely be lower for firms with positions far below the speculative limits, but higher for firms with large or complex positions as those firms may need comprehensive, real-time analysis.[771] The Commission further explained that due to the variation in both number of positions held and degree of sophistication in existing risk management systems, it was not feasible for the Commission to provide a greater degree of specificity as to the particularized costs for swaps firms.[772]

At this time, the Commission remains in the early stages of implementing the suite of Dodd-Frank Act regulations addressing swap markets now under its jurisdiction. The Commission is registering swap dealers and major swaps participants for the first time. Much of the infrastructure, including execution facilities, of the new markets has only recently become operational, and the collection of comprehensive regulatory data on physical commodity swaps is in its infancy. Because of this, the Commission is unable to estimate with precision the likely number of impacted swaps-only traders who would be subject to position limits for the first time. However, the Commission

[767] The Commission's estimates concerning the wage rates are based on 2011 salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA''). The Commission is using $120 per hour, which is derived from a weighted average of salaries across different professions from the SIFMA Report on Management & Professional Earnings in the Securities Industry 2011, modified to account for an 1800-hour work-year, adjusted to account for the average rate of inflation in 2012, and multiplied by 1.33 to account for benefits and 1.5 to account for overhead and administrative expenses. The Commission anticipates that compliance with the provisions would require the work of an information technology professional; a compliance manager; an accounting professional; and an associate general counsel. Thus, the wage rate is a weighted national average of salary for professionals with the following titles (and their relative weight); ''programmer (senior)'' and ''programmer (non-senior)'' (15% weight), ''senior accountant'' (15%) ''compliance manager'' (30%), and ''assistant/associate general counsel'' (40%). All monetary estimates have been rounded to the nearest hundred dollars.

[768] The Commission notes that costs associated with the inclusion of swaps contracts in the federal position limits regime are the direct result of changes made by the Dodd-Frank Act to section 4a of the Act. The Commission presents a discussion of these costs in order to be transparent regarding the effects of the proposed rules.

[769] *See* 17 CFR 23.601.

[770] *See* 76 FR at 71667. The presentation of costs on a five-year annualized basis is consistent with requirements under the Paperwork Reduction Act (''PRA''). *See* OMB Form 83–I requiring the Commission's Paperwork Reduction Act analysis be submitted with ''annualized'' costs in all categories. Instructions for the form do not provide instructions for annualizing costs; the Commission chose to annualize over a five year period.

[771] *Id.* (n. 401).

[772] *Id.*

preliminarily believes that a relatively small number of swaps-only traders will be affected. The Commission anticipates that most of the traders in swaps markets that accumulate physical commodity swap positions of a sufficiently high volume to engender concern for crossing position limit thresholds either: Are required to register as swap dealers or major swaps participants and as such already have systems in place to monitor limits in accordance with § 23.601; or, are also active in futures markets and as such have the ability to leverage existing strategies for monitoring limits.

Accordingly, for purposes of proposing these amendments to § 150.2, the Commission again estimates that swaps entities will incur, on average, labor costs per entity ranging from 40 to 1,000 hours; between $25,000 and $500,000 in total (non-annualized) capital/start-up costs and $1,000 to $20,000 in annual operating and maintenance costs. These estimates provide a preliminary range of costs for monitoring positions that reflects, on average, costs that market participants may incur based on their specific, individualized needs.

Finally, proposed § 150.2(e)(3)(ii) requires DCMs that list a core referenced futures contract to supply to the Commission estimates of deliverable supply. The Commission proposes to require staggered submission of the deliverable supply estimates in order to spread out the administrative burden of the proposed rules. Further, for contracts with DCM-set limits, an exchange would have already estimated deliverable supply in order to set spot-month position limit or demonstrate continued compliance with core principles 3 and 5. Thus, the Commission does not anticipate a large burden to result from the proposed § 150.2(e)(3)(ii). The Commission preliminarily believes that, as estimated in accordance with the Paperwork Reduction Act (''PRA''), the submission would require a labor burden of approximately 20 hours per estimate. Thus, a DCM that submits one estimate may incur a burden of 20 hours for a cost, using the estimated hourly wage of $120,[773] of approximately $2,400. DCMs that submit more than one estimate may multiply this per-estimate burden by the number of estimates submitted to obtain an approximate total burden for all submissions, subject to any efficiencies and economies of scale that may result from submitting multiple estimates.

c. Request for Comment

Do the estimates presented accurately reflect the expected costs of monitoring position limits under the proposed rule? Would the proposed rule engender material costs for monitoring positions addition to those the Commission has identified? Are the assumptions reflected in the Commission's consideration of the proposed rule's costs to monitor limits valid? If not, why and to what degree?

Is the Commission's view that aggregate limits as proposed will not create overly restrictive limit levels valid? Would the aggregated, cross-exchange nature of the limits as proposed in § 150.2 engender material costs that the Commission has not identified?

Are there other cost factors related to operational changes that the Commission should consider? What other factors should the Commission consider?

The Commission requests that commenters submit data or other information to assist it in quantifying anticipated costs of proposed § 150.2 and to support their own assertions concerning costs associated with proposed § 150.2.

iv. Consideration of Alternatives

The Commission recognizes there exist alternatives to its discretionary proposals herein. These include the alternative of setting initial levels for spot month speculative position limit based on estimates of deliverable supply, as provided by the CME Group, rather than at the levels proposed in appendix D. The Commission requests comment on whether an alternative to what is proposed, including setting initial limits based on a current estimate of deliverable supply, would result in a superior benefit-cost profile, with support for any such position provided.

4. Section 150.3—Exemptions

CEA section 4a(a)(7), added by the Dodd-Frank Act, authorizes the Commission to exempt, conditionally or unconditionally, any person, swap, futures contract, or option—as well as any class of the same—from the position limit requirements that the Commission establishes. Current § 150.3 specifies three types of positions for exemption from calculation against the federal limits prescribed by the Commission under § 150.2: (1) Bona fide hedges, (2) spreads or arbitrage between single months of a futures contract (and/or, on a futures-equivalent basis, options), and (3) those of an ''eligible entity'' as that term is defined in § 150.1(d)[774] carried in a separate account by an independent account controller (''IAC'')[775] when specific conditions are met. The Commission proposes to make organizational and conforming changes to § 150.3 as well as several substantive changes. By exempting positions that pose less risk of unduly burdening interstate commerce from position limit regulation, these substantive revisions would further the Commission's mission specified in CEA section 4a(a)(3).

The proposed organizational/conforming changes consist of updating cross references;[776] relocating the IAC exemption to consolidate it with the Commission's separate proposal to amend the aggregation requirements of § 150.4;[777] and deleting the calendar month spread provision that, due to changes proposed under § 150.2, would be rendered unnecessary.[778] These amendments will facilitate reader ease-of-use and clarity. However, the Commission foresees little additional impact from these non-substantive proposed amendments.

The proposed substantive changes to § 150.3 would revise an existing exemption, add three additional exemptions, and revise recordkeeping requirements. As summarized in the section below, proposed § 150.3 would: (i) Codify in Commission regulation the statutory requirement of CEA section 4a(c)(1) that federal position limits not apply to bona fide hedging as defined by the Commission; (ii) add exemptions for financial distress situations, certain spot-month positions in cash-settled reference contracts, and pre-Dodd-Frank and transition period swaps; (iii) provide guidance for non-enumerated exemptions, including the deletion of § 1.47; and (iv) revise recordkeeping

[774] For example, an operator of a commodity pool or certain other trading vehicle, a commodity trading advisor, or another specified financial entity such as a bank, trust company, savings association, or insurance company.

[775] IACs are defined currently in 17 CFR 150.1(e). Amendments to that definition are being proposed in a separate release. *See* Aggregation NPRM.

[776] Specifically, as described above: a) proposed § 150.3(a)(1)(i) would update the cross-references to the bona fide hedging definition to reflect its proposed replacement in amended § 150.1 from its current location in § 1.3(z); b) proposed § 150.3(a)(3) would add a new cross-reference to the reporting requirements proposed to be amended in part 19; and c) proposed § 150.3(i) would add a cross-reference to the updated aggregation rules in proposed § 150.4.

[777] *See* Aggregation NPRM. The exemption for accounts carried by an IAC is set out in proposed § 150.4(b)(5); adoption of that proposal would render current § 150.3(a)(4) duplicative.

[778] More specifically, as discussed *supra,* the Commission proposes to amend § 150.2 to increase the level of single month position limits to the same level as all months limits. As a result, the spread exemption set forth in current § 150.3(a)(3) that permits a spread trader to exceed single month limits only to the extent of the all months limit would no longer provide useful relief.

requirements for traders claiming any exemption from the federal speculative position limits.

i. Rule Summary

a. Section 150.3(a) Bona Fide Hedging Exemption

As does current § 150.3(a)(1), proposed § 150.3(a)(1)(i) will codify the statutory requirement that bona fide hedging positions be exempt from federal position limits. To the extent that benefits and costs would derive from the Commission's proposed amendment in § 150.1 to the definition of ''bona fide hedging position'' that is discussed above. This proposed amendment would also require that the anticipatory hedging requirements proposed in § 150.7, the recordkeeping requirements proposed in § 150.3(g), and the reporting requirements in proposed part 19 are met in order to claim the exemption. Any benefits and costs attributable to these features of the rule are considered below in the respective discussions of proposed § 150.7, § 150.3(g) and Part 19.

b. Section 150.3(b) Financial Distress Exemption

Proposed § 150.3(b) provides the means for market participants to request relief from applicable speculative position limits during times of market stress. The proposed rule allows for exemption under certain financial distress circumstances, including the default of a customer, affiliate, or acquisition target of the requesting entity, that may require an entity to assume in short order the positions of another entity.

c. Section 150.3(c) Conditional Spot-Month Limit Exemption

Proposed § 150.3(c) would provide a conditional spot-month limit exemption that permits traders to acquire positions up to five times the spot month limit if such positions are exclusively in cash-settled contracts. The conditional exemption would not be available to traders who hold or control positions in the spot-month physical-delivery referenced contract in order to reduce the risk that traders with large positions in cash-settled contracts would attempt to distort the physical-delivery price to benefit such positions.

The proposed conditional exemption is consistent with current exchange-set position limits on certain cash-settled natural gas futures and swaps.[779] Both NYMEX and ICE have established conditional spot month limits in their cash-settled natural gas contracts at a level five times the level of the spot month limit in the physical-delivery futures contract. Since spot-month limit levels for referenced contracts will be set at no greater than 25 percent of the estimated deliverable supply in the relevant core referenced futures contract, the proposed exemption would allow a speculative trader to hold or control positions in cash-settled referenced contracts equal to no greater than 125 percent of the spot month limit.

Historically, the Commission has been particularly concerned about protecting the spot month in physical-delivery futures contracts because they are most at risk for corners and squeezes. This acute risk is the reason that speculative limits in physical-delivery markets are generally set more restrictively during the spot month. The conditional exemption, as proposed, would constrain the potential for manipulative or disruptive activity in the physical-delivery contracts during the spot month by capping speculative trading in such contracts; however, in parallel cash-settled contracts, where the potential for manipulative or disruptive activity is much lower, the conditional exemption would broaden speculative trading opportunity, potentially providing additional liquidity for bona fide hedgers in cash-settled contracts.

In proposing the conditional limit, the Commission has examined market data on the effectiveness of conditional spot-month limits in natural gas markets, including the data submitted as part of the rulemaking for now-vacated part 151.[780] The Commission has also examined market data in other contracts, and has observed that open interest levels naturally decline in the physical-delivery contract leading up to and during the spot month, as the contract approaches expiration.[781] Both hedgers and speculators exit the physical-delivery contract in order to, for example, roll their positions to the next contract month or avoid delivery obligations. Market participants in cash-settled contracts, however, tend to hold their positions through to expiration. This market behavior suggests that the conditional spot-month limit exemption should not affect liquidity in the spot month of the physical-delivery contract, as open interest is rapidly declining.[782] The exemption, would, however, provide the opportunity for speculative trading to increase in the cash-settled contract. The Commission preliminarily believes that while this proposed exemption would remove certain constraints from speculative trading in cash-settled contracts, it would not damage liquidity in the aggregate, *i.e.,* across physical-delivery and cash-settled contracts in the same commodity. On this basis, the Commission preliminarily believes a conditional limit in additional commodities is consistent with the statutory direction to deter manipulation while ensuring sufficient liquidity for bona fide hedgers without disrupting the price discovery process.

The Commission's current proposal would not restrict a trader's cash commodity position. Instead, the Commission proposes to require enhanced reporting of cash market positions of traders availing themselves of the conditional spot-month limit. As discussed in the proposed changes to part 19, the Commission proposes to initially require this enhanced reporting only for the natural gas contract until it gains more experience administering the conditional spot month limit in the other referenced contracts. The Commission preliminarily believes that the proposed reporting regime in natural gas will provide useful information that can be deployed by surveillance staff to detect and potentially deter manipulative schemes involving the cash market.

d. Section 150.3(d) Pre-Enactment and Transition Period Swaps Exemption

To implement the statutory requirement of CEA section 4a(b)(2),[783] proposed § 150.3(d) would provide an exemption from federal position limits for swaps entered into prior to July 21, 2010 (the date of the enactment of the Dodd-Frank Act), the terms of which have not expired as of that date, and for swaps entered into during the period commencing July 22, 2010, the terms of which have not expired as of that date, and ending 60 days after the publication of final rule § 150.3 in the **Federal Register**, *i.e.,* its effective date. The Commission would allow both pre-enactment and transition swaps to be netted with commodity derivative contracts acquired more than 60 days after publication of final rule § 150.3 in the **Federal Register** for the purpose of

[779] *See* discussion above.

[780] *See* 76 FR at 71635 (n. 100–01).

[781] *See* discussion above.

[782] Traders participating in the physical-delivery contract in the spot month are understood to have a commercial reason or need to stay in the spot month; the Commission preliminarily believes at this time that it is unlikely that the factors keeping traders in the spot month physical-delivery contract will change due solely to the introduction of a higher cash-settled contract limit.

[783] CEA section 4a(b)(2) states in part that ''any position limit fixed by the Commission . . . good faith prior to the effective date of such rule, regulation or order.'' 7 U.S.C. 6a(b)(2).

complying with any non-spot-month position limit.[784] This exemption facilitates the transition to full position limits compliance for previously unregulated swaps markets. Allowing netting with pre-enactment and transition swaps provides flexibility where possible in order to lessen the impact of the regime on entities that trade swaps.

e. Section 150.3(e) and (f) Other Exemptions and Previously Granted Exemptions

Proposed § 150.3(e) and (f) provide information on other exemptive relief not specified by other sections of § 150.3. The Commission previously permitted a person to file an application seeking approval for a non-enumerated position to be recognized as a bona fide hedging position under § 1.47. Though the Commission is proposing to delete § 1.47, the Commission believes it is appropriate to provide persons the opportunity to seek exemptive relief.

Proposed § 150.3(e) provides guidance to persons seeking exemptive relief. A person engaged in risk-reducing practices that are not enumerated in the revised definition of bona fide hedging in proposed § 150.1 may use two different avenues to apply to the Commission for relief from federal position limits. The person may request an interpretative letter from Commission staff pursuant to § 140.99[785] concerning the applicability of the bona fide hedging position exemption, or may seek exemptive relief from the Commission under section 4a(a)(7) of the Act.[786]

f. Section 150.3(g) and (h) Recordkeeping

Proposed § 150.3(g)(1) specifies recordkeeping requirements for persons who claim any exemption set forth in proposed § 150.3. Persons claiming exemptions under § 150.3 would need to maintain complete books and records concerning all details of their related cash, forward, futures, options and swap positions and transactions. Proposed § 150.3(g)(1) is largely duplicative of other recordkeeping obligations imposed on market participants, including provisions in § 1.35 and § 18.05 as amended by the Commission to conform with the Dodd-Frank Act.[787] Proposed § 150.3(g)(2) require persons seeking to rely upon the pass-through swap offset exemption to obtain a representation from its counterparty that the swap qualifies as a bona fide hedging position and to retain this representation on file. Similarly, proposed § 150.3(g)(3) requires a person who makes such a representation to maintain records supporting the representation. Under proposed § 150.3(h), all persons would need to make such books and records available to the Commission upon request, which would preserve the "call for information" rule set forth in current § 150.3(b).

ii. Benefits

In articulating exemptions from position limit requirements, § 150.3 works in concert with § 150.2 as it pertains to Commission-specified federal limits and with certain requirements of § 150.5 pertaining to exchange-set position limits. Functioning as an integrated component within the broader position-limits regulatory regime, the Commission believes the proposed changes to § 150.3 accomplish, to the maximum extent practicable, the four objectives outlined in CEA section 4a(a)(3). As such, the Commission perceives these proposed amendments to offer significant benefits. These are explained more specifically below.

a. Section 150.3(b) Financial Distress Exemption

In codifying the Commission's historical practice of temporarily lifting position limit restrictions, the proposed rule further strengthens the benefits of accommodating transfers of positions from financially distressed firms to financially secure firms or facilitating other necessary remediation measures during times of market stress. More specifically, due to the improved facility and transparency with respect to the availability of this exemption, it becomes less likely that positions will be prematurely or unnecessarily liquidated. The disorderly liquidation of a position poses the threat of price impacts that may harm the efficiency as well as the price discovery function of markets. In addition, the availability of a financial distress exemption provides market participants with a degree of confidence that the Commission has the appropriate tools to facilitate the transfer of positions expeditiously in times of market uncertainty.

b. Section 150.3(c) Conditional Spot-month Limit Exemption

The conditional spot-month limit exemption provides speculators with an opportunity to maintain relatively large positions in cash-settled contracts up to but no greater than 125 percent of the spot-month limit. By prohibiting speculators using the exemption in the cash-settled contract from trading in the spot-month of the physical-delivery contract, the proposed rules should further protect the delivery and settlement process. In addition, the condition of the exemption—*i.e.,* a trader availing himself of the exemption may not have any position in the physical-delivery contract—reduces the ability for a trader with a large cash-settled contract position to attempt to manipulate the physical-delivery contract price in order to benefit his position. As such, the conditional spot-month limit exemption would further three of the goals under CEA section 4a(a)(3)—deterring market manipulation, and ensuring sufficient market liquidity for bona fide hedgers, without disrupting the price discovery process.

The proposed rules are specifically intended to provide an alternate structure to the one that is currently in place that also meets the objectives to deter and prevent manipulation and to ensure sufficient market liquidity. In this way, the conditional limit exemption provides flexibility for market participants and the Commission to meet the objectives outlined in CEA section 4a(a)(3). The Commission expects that market participants will respond to the flexibility afforded by the proposed exemption in order to fulfill their needs in a manner that is consistent with their business interests, although it cannot reasonably predict how markets, DCMs and market participants will adapt. Accordingly, the Commission requests comment on this exemption, its potential impacts on trading strategies, competition, and any other direct or indirect costs to markets or market participants and exchanges that could arise as a result of the conditional spot-month limit exemption.

c. Section 150.3(d) Pre-Enactment and Transition Period Swaps Exemption

The pre-existing swaps exemption in proposed § 150.3(d) is consistent with CEA section 4a(b)(2). This exemption facilitates the transition to full position

[784] Because of concerns regarding manipulation during the delivery period of a referenced contract, the proposed rule would not allow pre- and post-enactment and transition swaps to be netted for the purpose of complying with any spot-month position limit.

[785] 17 CFR 140.99 defines three types of staff letters—exemptive letters, no-action letters, and interpretative letters—that differ in terms of scope and effect. An interpretative letter is written advice or guidance by the staff of a division of the Commission or its Office of the General Counsel. It binds only the staff of the division that issued it (or the Office of the General Counsel, as the case may be), and third-parties may rely upon it as the interpretation of that staff.

[786] *See supra* discussion of CEA section 4a(a)(7).

[787] 77 FR 66288, Nov. 2, 2012.

limits compliance for previously unregulated swaps markets. Allowing netting with post-enactment swaps outside of the spot-month provides flexibility where possible in order to lessen the impact of the regime on entities that trade swaps.

d. Section 150.3(e)–(f) Other Exemptions and Previously Granted Exemptions

The proposed amendments to § 150.3(e) and the replacement of existing § 1.47 with new proposed § 150.3(f) are essentially clarifying and organizational in nature. As such they will confer limited substantive benefits beyond providing market participants with clarity regarding the process for obtaining non-enumerated exemptive relief and promoting regulatory certainty for those granted exemptions pursuant to § 1.47.

e. Section 150.3(g) Recordkeeping

By requiring that market participants who avail themselves of the exemptions offered under § 150.3 maintain certain records to document their exemption eligibility and make such records available to the Commission on request, the rule reinforces proposed § 150.2 and § 150.3 and helps to accomplish, to the maximum extent practicable, the goals set out in CEA section 4a(a)(3)(B). Supporting books and records are critical to the Commission's ability to effectively monitor compliance with exemption eligibility standards each and every time an exemption is employed. Absent this ability, exemptions are more susceptible to abuse. This susceptibility increases the potential that position limits function in a diminished capacity than intended to prevent excessive speculation and/or market manipulation.

f. Request for Comment

The Commission requests comments on its considerations of the benefits associated with the proposed amendments to § 150.3, including data or other information to assist the Commission in identifying the number and type of market participants that will realize, respectively, the benefits identified and/or to monetize such benefits. Has the Commission correctly identified market behavior and incentives that affect or would likely be affected by the conditional spot-month limit exemption? What other potential benefits could the conditional spot-month limit exemption have for markets and/or market participants? Will the exemptions proposed likely result in any benefits, direct or indirect, for markets and/or market participants in addition to those that the Commission has identified? If so, what, and why and how will they result? Has the Commission misidentified or overestimated any benefits likely to result from the proposed exemptions? If so, which and/or to what extent?

iii. Costs

In general, the exemptions proposed in § 150.3 do not increase the costs of complying with position limits, and in fact may decrease these costs by providing for relief from speculative limits in certain situations. The exemptions are elective, so no entity is required to assert an exemption if it determines the costs of doing so do not justify the potential benefit resulting from the exemption. Thus, the Commission does not anticipate the costs of obtaining any of the exemptions to be overly burdensome. Nor does the Commission anticipate the costs would be so great as to discourage entities from utilizing available exemptions, as applicable.

Potential costs attendant to the proposed amendments to § 150.3 are discussed specifically below.

a. Section 150.3(b) Financial Distress Exemption

The Commission anticipates the costs associated with the codification of the financial distress exemption to be minimal. Market participants who voluntarily employ these exemptions will incur costs stemming from the requisite filing and recordkeeping obligations that attend the exemptions.[788] Along with performing its due diligence to acquire a distressed firm, or positions held or controlled by a distressed firm, an entity would have to update and submit to the Commission a request for the financial distress exemption. The Commission is unable at this time to accurately estimate how often this exemption may be invoked, as emergency or distressed market situations by nature are unpredictable and dependent on a variety of firm- and market-specific idiosyncratic factors as well as general macroeconomic indicators. Given the unusual and unpredictable nature of emergency or distressed market situations, the Commission anticipates that this exemption would be invoked infrequently, but is unable to provide a more precise estimate. The Commission also assumes that codifying the proposed rule and thus lending a level of transparency to the process will result in an administrative burden that is less onerous than the current regime. In addition, the Commission believes that in the case that one firm is assuming the positions of a financially distressed firm, the costs of claiming the exemption would be incidental to the costs of assuming the position.

b. Section 150.3(c) Conditional Spot-month Limit Exemption

A market participant that elects to exercise this exemption, one that is not available under current rules, will incur certain direct costs to do so. A person seeking to utilize this exemption for the natural gas market must file Form 504 in accordance with requirements listed in proposed § 19.01.[789] If that person currently has any position in the physical-delivery contract, such person may incur costs associated with liquidating that position in order to meet the conditions of the conditional spot-month limit exemption. As previously discussed, the conditional spot month limit is designed to deter market manipulation without disrupting the price discovery process. The Commission does not have reason to believe that liquidity, in the aggregate (across the core referenced and referenced contracts), will be adversely impacted. However, the proposed rules are specifically intended to provide an alternative to the position limit regime that is currently in place for the purpose of deterring and preventing manipulation and ensuring sufficient market liquidity; the Commission expects that market participants will respond to the flexibility afforded by the proposed exemption in order to fulfill their needs in a manner that is consistent with their business interests, although it cannot reasonably predict how markets, DCMs and market participants will adapt. Accordingly, the Commission requests comment on this exemption, its potential impacts on trading strategies, competition, and any other direct or indirect costs to markets or market participants and exchanges that could arise as a result of the conditional spot-month limit exemption.

c. Section 150.3(d) Pre-Enactment and Transition Period Swaps Exemption

The exemption offered in proposed § 150.3(d) is self-executing and would not require a market participant to file for relief. However, a firm may incur costs to identify positions eligible for

[788] *See supra* considerations of costs and benefits of the proposed amendments to part 19 and the Paperwork Reduction Act.

[789] Specific costs associated with filing Form 504 are considered above in the sections that implement that form, namely the discussion of the costs and benefits of proposed amendments to part 19 and the Paperwork Reduction Act .

the exemption and to determine if that position is to be netted with post-enactment swaps for purposes of complying with a non-spot-month position limit. Such costs would be assumed voluntarily by a market participant in order to avail itself of the exemption, and the Commission does not anticipate these costs to be overly burdensome.

d. Section 150.3(e)–(f) Other Exemptions and Previously Granted Exemptions

Under the proposed § 150.3(e), market participants electing to seek an exemption other than those specifically enumerated, will incur certain direct costs to do so. First, they will incur costs related to petitioning the Commission under § 140.99 of the Commission's regulations or under CEA section 4a(a)(7). To the extent these costs may be marginally greater than a market participant would experience to seek an exemption under the process afforded under current § 1.47—something the Commission cannot rule out at this time—the cost difference between the two is attributable to this rulemaking.[790] Further, market participants who had previously relied upon the exemptions granted under § 1.47 would be able to continue to rely on such exemptions for existing positions. Going forward, market participants would need to enter into a new position that fits within applicable limits or are eligible for an alternate exemption, in which case the participants may incur costs associated with applying for such exemptions. The Commission is unable to ascertain at this time the number of participants affected by these proposed regulations. The Commission notes, however, that a decision to incur the costs inherent in seeking relief is voluntary.

e. Section 150.3(g) Recordkeeping

Finally, any person that elects to exercise an exemption provided in proposed § 150.3 would incur costs attributable to additional recordkeeping obligations under proposed § 150.3(e)–(g). The Commission preliminarily believes that these costs will be minimal, as participants already maintain books and records under a variety of other Commission regulations and as the information required in these sections is likely already being maintained as part of prudent accounting and risk management policies and procedures. The Commission preliminarily believes that, as estimated in accordance with the PRA, a total of 400 entities will incur an annual labor burden of approximately 50 hours each, or 20,000 total hours for all affected entities, to comply with the additional recordkeeping obligations. Using an estimated hourly wage of $120 per hour,[791] the Commission anticipates an annual burden of approximately $6,000 per entity and a total of $2,400,000 for all affected entities.

f. Request for Comment

The Commission requests comment on its considerations of the costs associated with the proposed changes to § 150.3. Are there other costs associated with new exemptions that the Commission should consider? With respect to the proposed conditional spot-month limit exemption, specifically, the Commission welcomes comments regarding the potential cost impact on trading strategies, any other direct or indirect costs to markets or market participants that could arise as a result of it, and the estimated number of impacted entities.

iv. Consideration of Alternatives

The Commission recognizes that alternatives may exist to discretionary elements of § 150.3 proposed herein. The Commission requests comment on whether an alternative to what is proposed would result in a superior benefit-cost profile, with support for any such position provided.

5. Section 150.5—Exchange-Set Speculative Position Limits

Current § 150.5 addresses the requirements and acceptable practices for exchanges in setting speculative position limits or position accountability levels for futures and options contracts traded on each exchange. As further described above,[792] the CFMA's amendments to the CEA in 2000 gave DCMs discretion to set those limits or levels within the statutory requirements of core principle 5.[793] With this grant of statutory discretion, § 150.5 became non-binding guidance and accepted practice to assist the exchanges in meeting their statutory responsibilities under the core principles.[794] Subsequently, the Dodd-Frank Act scaled back the discretion afforded DCMs for establishing position limits under the earlier CFMA amendments. Specifically, among other things, the 2010 law: (1) amended core principle 1 to expressly subordinate DCMs' discretion in complying with statutory core principles to Commission rules and regulations; and (2) amended core principle 5 to additionally require that, with respect to contracts subject to a position limit set by the Commission under CEA section 4a, a DCM must set limits no higher than those prescribed by the Commission.[795] The Dodd-Frank Act also added parallel core principle obligations on newly-authorized SEFs, including SEF core principle 6 regarding the establishment of position limits.[796]

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[790] Alternatively, to the extent petitioning the Commission under § 140.99 or under CEA section 4a(a)(7) results in lower costs relative to those necessary to utilize the current § 1.47 process, the cost difference is a benefit attributable to this rulemaking. The Commission requests comment concerning whether, and to what degree, requiring petitions for exemption under § 140.99 or under CEA section 4a(a)(7) in place of current § 1.47 is likely to result in any material cost difference.

[791] The Commission's estimates concerning the wage rates are based on 2011 salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA''). The Commission is using $120 per hour, which is derived from a weighted average of salaries across different professions from the SIFMA Report on Management & Professional Earnings in the Securities Industry 2011, modified to account for an 1800-hour work-year, adjusted to account for the average rate of inflation in 2012, and multiplied by 1.33 to account for benefits and 1.5 to account for overhead and administrative expenses. The Commission anticipates that compliance with the provisions would require the work of an information technology professional; a compliance manager; an accounting professional; and an associate general counsel. Thus, the wage rate is a weighted national average of salary for professionals with the following titles (and their relative weight); ''programmer (senior)'' and ''programmer (non-senior)'' (15% weight), ''senior accountant'' (15%) ''compliance manager'' (30%), and ''assistant/associate general counsel'' (40%). All monetary estimates have been rounded to the nearest hundred dollars.

[792] *See* discussion above.

[793] CEA section 5(d)(5) (specifying DCM core principle 5 titled ''Position Limits or Accountability'').

[794] Specifically, in 2001, the Commission adopted in part 38 app. B (Guidance on, and acceptable Practices in, Compliance with Core Principles), 66 FR 42256, 42280, Aug. 10, 2001, an acceptable practice for compliance with DCM core principle 5 that stated ''[p]rovisions concerning speculative position limits are set forth in part 150.'' Current § 150.5 states that each DCM shall ''limit the maximum number of contracts a person may hold or control, separately or in combination, net long or net sort, for the purchase or sale of a commodity for future delivery or, on a futures-equivalent basis, options thereon,'' with certain exemptions. Exemptions from federal limits include major foreign currencies and ''spread, straddles or arbitrage'' exemptions. Current § 150.5 expressly excludes bona fide hedging positions from limits, but acknowledges that exchanges may limit positions ''not in accord with sound commercial practices or exceed an amount which may be established and liquidated in an orderly fashion.''

[795] Dodd-Frank Act section 735(b). CEA section 4a(e), effective prior to, and not amended by, the Dodd-Frank Act, likewise provides that position limits fixed by a board of trade not exceed federal limits. 7 U.S.C. 6a(e).

[796] Dodd-Frank Act section 733 (adding CEA section 5h; 7 U.S.C. 7b–3).

i. Rule Summary

In light of these Dodd-Frank Act statutory amendments, the Commission proposes to amend § 150.5 to specify certain binding requirements with which DCMs and SEFs must comply in establishing exchange-set limits. [797] Specifically, proposed § 150.5(a)(1) would require that DCMs and SEFs set limits for contracts listed in § 150.2(d) at a level not higher than the levels specified in § 150.2. Proposed § 150.5(a)(5) and (b)(8) would require that exchanges adopt aggregation rules that conform to proposed § 150.4 for all contracts, including those contracts subject to federal speculative limits. Proposed § 150.5(a)(2)(i) and (b)(5)(i) would require that exchanges conform their bona fide hedging exemption rules to the proposed § 150.1 definition of bona fide hedging for all contracts, including those contracts subject to federal speculative limits. Proposed § 150.5(a)(2)(iii) and (b)(5)(iii) would require that exchanges condition any exemptive relief from federal or exchange-set position limits on an application from the trader.[798] To the extent an exchange offers exemptive relief for intra- and inter-market spread positions for contracts subject to federal limits under proposed § 150.2, proposed § 150.5(a)(2)(i) and (ii) would require that the exchange provide such relief only outside of the spot month for physical-delivery contracts and, with respect to intra-market spread positions, on the condition that such positions do not exceed the all-months limit. Finally, proposed § 150.5(a)(4) would further implement the statutory provision in CEA section 4a(b)(2) that exempts pre-existing positions, while § 150.5(a)(3) would require exchanges to mirror the Commission's exemption in proposed § 150.3 for pre-enactment and transition period swaps from exchange-set limits on contracts subject to limits under proposed § 150.2. Proposed § 150.5(a)(3) would also require exchanges to allow the netting of pre-enactment and transition swaps with post-effective date commodity derivative contracts for the purpose of complying with any non-spot-month position limit.

Two of these proposed requirements—*i.e.,* that for contracts subject to limits specified in § 150.2, DCMs and SEFs set limits no higher than those specified in § 150.2, and that pre-existing positions must be exempted from exchange-set limits on contracts subject to § 150.2—exclusively codify statutory requirements, and therefore reflect no exercise of Commission discretion subject to CEA section 15(a). The other-listed requirements, however, do involve Commission discretion, the costs and benefits of which are considered below.

ii. Benefits

Functioning as an integrated component within the broader position-limits regulatory regime, the Commission expects the proposed changes to § 150.5 would further the four objectives outlined in CEA section 4a(a)(3).[799] As explained more fully below, the Commission believes these proposed amendments offer significant benefits.

a. Section 150.5(a)(5) and (b)(8) Aggregation

CEA section 4a(a)(1) states that the Commission, ''[in] determining whether any person has exceeded such limits,'' must include ''the positions held and trading done by any persons directly or indirectly controlled'' by such person. Pursuant to this statutory direction, the Commission has proposed in a separate release amendments to its aggregation policy, located in § 150.4.[800] The regulations proposed in this release require that exchange-set limits employ aggregation policies that conform to the Commission's aggregation policy both for contracts that are subject to federal limits under § 150.2 and those that are not, thus harmonizing aggregation rules for all federal and exchange-set speculative position limits.

For contracts subject to federal speculative position limits under proposed § 150.2, the Commission anticipates that a harmonized approach to aggregation will prevent confusion that otherwise might result from allowing divergent standards between federal and exchange-set limits on the same contracts. Further, the proposed approach would prevent the kind of regulatory arbitrage that may impede the benefits of the federal speculative position limits regime. The harmonized approach to aggregation policies for limits on all levels eliminates the potential for exchanges to use permissiveness in aggregation policies as a competitive advantage and therefore prevents a ''race to the bottom,'' which would impair the effectiveness of the Commission's aggregation policy. In addition, DCMs and SEFs are required to set position limits at a level not higher than that set by the Commission. Differing aggregation standards may have the practical effect of lowering a DCM- or SEF-set limit to a level that is lower than that set by the Commission. Accordingly, harmonizing aggregation standards reinforces the efficacy and intended purpose of §§ 150.5(a)(2)(iii) and (b)(5)(iii) by foreclosing an avenue to circumvent applicable limits.

Moreover, by extending this harmonized approach to contracts not included in proposed § 150.2, the Commission is proposing a common standard for all federal and exchange-set limits. The proposed rule provides uniformity, consistency, and certainty for traders who are active on multiple trading venues, and thus should reduce the administrative burden on traders as well as the burden on the Commission in monitoring the markets under its jurisdiction.

b. Section 150.5(a)(2)(i) and (b)(5)(i) Hedge Exemptions

The proposed rules also promote a common standard for bona fide hedging exemptions by requiring such exemptions granted by an exchange to conform with the proposed definition of bona fide hedging in § 150.1. For contracts subject to federal limits under proposed § 150.2, the proposed rules under § 150.5(a)(2)(i) prescribe a harmonized approach intended to prevent the confusion that may arise should the same contract have differing standards of bona fide hedging between the Commission's federal standard and the standard on any given exchange. As discussed above, the definition of bona fide hedging proposed by the Commission in this release allows only positions that represent legitimate commercial risk to be exempt from position limits. Deviation from this definition could impede the effectiveness of the Commission's position limit regime by potentially allowing positions to be improperly exempted from speculative limits.

Proposed § 150.5(b)(5)(i) would extend this common standard of bona fide hedging to contracts not subject to

[797] As discussed *above,* proposed § 150.5 also would continue to incorporate non-exclusive guidance and acceptable practices for DCMs and SEFs with respect to setting limits with and without a measurable deliverable supply, adopting position accountability in lieu of a position limits scheme, and adjusting limit levels, among other things. As non-binding guidance and acceptable practices, these components of the rulemaking are not binding Commission regulations or orders subject to the requirement of CEA section 15(a).

[798] The Commission notes that for contracts subject to federal limits, exchange-granted exemptions would need to conform with the standards in proposed § 150.5(a)(2)(i) for hedge exemptions and proposed § 150.5(a)(2)(ii) for other exemptions.

[799] CEA section 4a(a)(3)(B) applies for purposes of setting federal limit levels. 7 U.S.C. 6a(a)(3)(B). The Commission considers the four factors set out in the section relevant for purposes of considering the benefits and costs of these proposed amendments addressed to exchange-set position limits as well.

[800] *See* Aggregation NPRM.

federal speculative limits, thereby creating a single standard across all trading venues that would reduce the administrative burden on market participants trading on multiple trading venues and the burden on the Commission of monitoring the markets under its jurisdiction.

c. Section 150.5(a)(2)(iii) and (b)(5)(iii) Application for Exemption

Proposed § 150.5 requires traders to apply to the exchange for any exemption from position limits. Requiring traders to apply to the exchange affirms the position of the DCM or SEF as the front-line regulator for position limits while providing the exchanges with information that can be used to ensure the legitimacy of a trader's position with regards to its eligibility for exemptive relief. By gathering information from traders' applications for exemption, exchanges will have a complete record of all exemptions requested, granted, and denied, as well as information about the commercial operations of traders who apply for exemptions. Because the Commission has not specified a format for such exemption applications, exchanges have flexibility to determine which information will best inform the exchange's self-regulatory operations and obligations.

The Commission understands that many DCMs are already requiring applications for exemptive relief from speculative position limits,[801] and that SEFs are likely to adopt this practice as a ''best practice'' for complying with core principles. As such, the proposed rules codify an industry ''best practice'' regarding position limits and promote the continuation of the benefits of that best practice across all trading venues and all commodity derivative contracts.

d. Section 150.5(a)(2)(ii) Other Exemptions

As discussed above, the Commission is proposing to set single-month limits at the same levels as all-months limits, rendering the ''spread'' exemption in current § 150.3 unnecessary. However, since DCM core principle 5 allows exchanges to set more restrictive levels than those set by the Commission, a DCM or SEF may set the single month limit at a lower level than that of the all-month limit. Further, because federal limits apply across trading venues, exchanges may grant spread exemptions for inter-market spreads across exchanges. As such, the Commission is proposing § 150.5(a)(2)(ii) to clarify the types of spread positions for which a DCM or SEF may grant exemptions by cross-referencing the definitions proposed in § 150.1 [802] and to require that any such exemption be outside of the spot month for physical-delivery contracts.

This exemption would provide exchanges with certainty regarding the application of spread exemptions for contracts subject to federal limits under proposed § 150.2. Should an exchange decide to provide exemptive relief for spread positions, the exemption described in § 150.5(a)(2)(ii) promotes the intended goals of federal speculative limits, including protection of the spot period in the physical-delivery contract and exemption of positions as appropriate.

e. Section 150.5(a)(3) Pre-Enactment and Transition Period Swaps Positions

Proposed § 150.5(a)(3) requires DCMs and SEFs to exempt pre-enactment and transition period swaps as defined in proposed § 150.1 from exchange-set limits on contracts subject to federal limits under proposed § 150.2. This provision mirrors the exemption proposed in § 150.3 and requires that exchanges provide the same relief as the Commission for pre-existing swaps positions.

Further, requiring that DCMs and SEFs allow netting of pre-and-post enactment swaps outside of the spot month provides additional flexibility on an exchange level for market participants in transitioning to a position limits regime that includes swaps.

f. Request for Comment

The Commission requests comment on its consideration of the benefits of proposed § 150.5. Are there additional benefits that the Commission should consider? Has the Commission misidentified any benefits?

iii. Costs

DCMs presently have considerable experience in setting and administering speculative position limits and hedge exemption programs in line with existing Commission guidance and acceptable practices that run parallel in most respects to the requirements that are incorporated in the proposed rule. Accordingly, as a general matter, the Commission anticipates minimal cost impact on DCMs from these proposed requirements; relative to DCMs, the cost impact for SEFs as newly-instituted entities may be somewhat greater.

The Commission notes that recently adopted § 37.204 of the Commission's regulations allows SEFs the flexibility to contract with a third-party regulatory service provider [803] to fulfill certain regulatory obligations.[804] The administration of position limits is within the range of obligations eligible for outsourcing to a third-party regulatory service provider. Presumably, a SEF will avail itself of this flexibility if doing so results in lower costs for the entity. In order to better inform itself with respect to the cost implications of this proposed rule for SEFs, the Commission requests comment on the likelihood of SEFs utilizing a third-party regulatory service provider to comply with its position limits obligations and the expected dollar costs of doing so. The Commission also requests comment on the expected dollar costs of meeting the proposed rule's requirement if a SEF undertakes to perform the proposed rule's obligations in-house rather than outsourcing them.

The following discusses potential costs with respect to the specific discretionary aspects of the rule to which they are attributable.

a. Section 150.5(a)(5) and (b)(8) Aggregation and § 150.5(a)(2)(i) and (b)(5)(i) Hedge Exemptions

DCMs may incur costs to amend their current aggregation and bona fide hedging policies to conform with proposed § 150.4 and proposed § 150.1 respectively. Such costs may include burdens associated with reviewing and evaluating current standards to assess differences that must be addressed, employing legal counsel to aid in ensuring conformity, and transitioning from an old standard to the new one. Because the burden associated with this rule is proportional to the divergence of a DCM's current standard from the Commission's proposed standard, costs are specific and proprietary to each affected entity; as such, the Commission is unable to estimate costs at this time within a range of reasonable accuracy. It requests comment to assist it in doing so.

SEFs, as newly-instituted entities, will be required to incur costs to develop aggregation and bona fide hedging policies that conform to the appropriate provisions as required

[801] *See, e.g.,* CME Rule 559; NYMEX Rule 559; CBOT Rule 559; KCBT Rule 559; ICE Futures Rules 6.26, 6.27, and 6.29; and MGEX Rule 1504.00.

[802] The terms ''inter-market spread'' and ''intra-market spread'' are defined in proposed § 150.1.

[803] Under § 37.204, possible third-party regulatory service providers include registered futures associations (such as the National Futures Association (NFA)), registered entities (such as DCMs or SEFs), and the Financial Industry Regulatory Authority (FINRA).

[804] *See* 78 FR 33476, 33516, Jun. 4, 2013.

under proposed § 150.5. Such costs are likely to include legal counsel, as well as drafting and implementation of the new policy. Because these entities are new and have not previously been subject to the Commission's oversight in this capacity, the Commission requests comment regarding the costs associated with implementing the appropriate policies.

b. Section 150.5(a)(2)(iii) and (b)(5)(iii) Application for Exemption

The Commission anticipates that DCMs will incur minimal costs to administer the application process for exemption relief in accordance with standards set forth in the proposed rule. As described above, the Commission understands that requiring traders to apply for exemptive relief comports with existing DCM practice. Accordingly, by incorporating an application requirement that the Commission has reason to understand most if not all active DCMs already follow, the rule should have little cost impact for DCMs.

For SEFs, the rules necessitate a compliant application regime, which will require an initial investment similar to that which DCMs have likely already made and need not duplicate. As noted above, the Commission considers it highly likely that, in accordance with industry best practices to comply with core principles and due to the utility of application information in demonstrating compliance with core principles, SEFs may incur such costs with or without the proposed rules. Again, due to the new existence of these entities, the Commission is unable to estimate what costs may be associated with the requirement to impose an application regime for exemptive relief on the exchange level. The Commission requests comment regarding the burden on a SEF to impose a compliant application regime.

c. Section 150.5(a)(2)(ii) Other Exemptions

Proposed § 150.5(a)(2)(ii) provides clarity on the imposition of exemptions for spread positions on contracts subject to federal limits under proposed § 150.2 in accordance with new definitions proposed in § 150.1. The Commission notes again that the rules would apply if the single-month limit is at a lower level than the all-month limit, which would occur if a DCM or SEF determines to set more restrictive levels for a single-month limit that what has been set by the Commission, or if the exchange grants inter-market spread exemptions. Thus, the Commission anticipates that a DCM or SEF that has determined to set a more restrictive limit will have done so having taken into account any burden imposed by the proposed rule. Further, some trading venues already grant inter-market spread exemptions on certain commodities; such entities may be able to leverage current practices to extend such spread exemptions to other commodities as appropriate.

The Commission expects small costs to be associated with communicating and monitoring the appropriate conditions for exemption as described in proposed § 150.5(a)(2)(ii), namely that such position must be solely outside of the spot-month of the physical-delivery contract.

d. Request for Comment

The Commission requests comment on its considerations of the costs of proposed § 150.5. Are there additional costs that the Commission should consider? Has the Commission misidentified any costs? What other relevant cost information or data, including alternative cost estimates, should the Commission consider and why?

iv. Consideration of Alternatives

The Commission recognizes that alternatives may exist to discretionary elements of § 150.5 proposed herein. The Commission requests comment on whether an alternative to what is proposed would result in a superior benefit-cost profile, with support for any such position provided.

6. Section 150.7—Reporting Requirements for Anticipatory Hedging Positions

The revised definition of bona fide hedging in proposed § 150.1 incorporates hedges of five specific types of anticipated transactions: unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated services contract payments or receipts, and anticipatory cross-hedges.[805] The Commission proposes reporting requirements in new § 150.7 for traders seeking an exemption from position limits for any of these five enumerated anticipated hedging transactions. Proposed § 150.7 would build on, and replace, the special reporting requirements for hedging of unsold anticipated production and unfilled anticipated requirements in current § 1.48.[806]

Current § 1.48 provides a procedure for persons to file for bona fide hedging exemptions for anticipated production or unfilled requirements when that person has not covered the anticipatory need with fixed-price commitments to sell a commodity, or inventory or fixed-price commitments to purchase a commodity. It reflects a long-standing Commission concern for the difficulty of distinguishing between reduction of risk arising from anticipatory needs and that arising from speculation if anticipatory transactions are not well defined.[807] These same concerns apply to any position undertaken to reduce the risk of anticipated transactions. To address them, the Commission proposes to extend the special reporting requirements in proposed § 150.7 for all types of enumerated anticipatory hedges that appear in the definition of bona fide hedging positions in proposed § 150.1.[808]

The Commission proposes to add a new series '04 reporting form, Form 704, to effectuate these additional and updated reporting requirements for anticipatory hedges. Persons wishing to avail themselves of an exemption for any of the anticipatory hedging transactions enumerated in the updated definition of bona fide hedging in proposed § 150.1 would be required to file an initial statement on Form 704 with the Commission at least ten days in advance of the date that such positions would be in excess of limits established in proposed § 150.2.

Proposed § 150.7(f) would add a requirement for any person who files an initial statement on Form 704 to provide annual updates that detail the person's actual cash market activities related to the anticipated exemption. Proposed § 150.7(g) would similarly enable the Commission to review and compare the

[805] *See,* paragraphs (3)(iii), (4)(i), (iii), and (iv), and (5), respectively, of the Commission's amended definition of bona fide hedging transactions in proposed § 150.1.

[806] *See* 17 CFR 1.48. *See also* definition of bona fide hedging transactions in current 17 CFR 1.3(z)(2)(i)(B) and (ii)(C), respectively.

[807] *See* Hedging Anticipated Requirements for Processing or Manufacturing under Section 4a(3) of the Commodity Exchange Act, 21 FR 6913, Sep. 12, 1956.

[808] For purposes of simplicity, the proposed special reporting requirements for anticipatory hedges would be placed within the Commission's position limits regime in part 150, and alongside the Commission's updated definition of bona fide hedging positions in proposed § 150.1; rendered duplicative by these changes, current § 1.48 would be deleted. In another non-substantive change, proposed § 150.7(i) would replace current § 140.97 which delegates to the Director of the Division of Market Oversight or his designee authority regarding requests for classification of positions as bona fide hedging under current §§ 1.47 and 1.48. For purposes of simplicity, this delegation of authority would be placed within the Commission's position limits regime in part 150.

actual cash activities and the remaining unused anticipated hedge transactions by requiring monthly reporting on Form 204.

As is the case under current § 1.48, proposed § 150.7(h) requires that a trader's maximum sales and purchases must not exceed the lesser of the approved exemption amount or the trader's current actual anticipated transaction.

i. Benefits and Costs

As noted above, the Commission remains concerned that distinguishing whether an over-the-limit position is entered into in order to reduce risk arising from anticipatory needs, or whether it is speculative, may be exceedingly difficult if anticipatory transactions are not well defined. The Commission proposes to add, in its discretion, proposed § 150.7 to collect vital information to aid in this distinction. Advance notice of a trader's intended maximum position in commodity derivative contracts to offset anticipatory risks would identify—in advance—a position as a bona fide hedging position, avoiding unnecessary contact during the trading day with surveillance staff to verify whether a hedge exemption application is in process, the appropriate level for the exemption and whether the exemption is being used in a manner that is consistent with the requirements. Market participants can anticipate hedging needs well in advance of assuming positions in derivatives markets and in many cases need to supply the same information after the fact; in such cases, providing the information in advance allows the Commission to better direct its efforts towards deterring and detecting manipulation. The annual updates in proposed § 150.7(f) similarly allow the Commission to verify on an ongoing basis that the person's anticipated cash market transactions closely track that person's real cash market activities. Absent monthly filing pursuant to proposed § 150.7(g), the Commission would need to issue a special call to determine why a person's commodity derivative contract position is, for example, larger than the pro rata balance of her annually reported anticipated production.

The Commission understands that there will be costs associated with proposed § 150.7(f) in the filing of Form 704. Costs of filing that form are discussed in the context of the proposed part 19 requirements.

The Commission requests comments on its consideration of the costs and benefits of proposed § 150.7. Are there additional costs or benefits the Commission should consider? What costs may be incurred beyond those incurred to gather information and file Form 704? Should the Commission consider alternatives to its annual updating requirement? The Commission also recognizes that alternatives may exist to discretionary elements of § 150.7 proposed herein. The Commission requests comments on whether an alternative to what is proposed would result in a superior benefit-cost profile, with support for any such position provided.

7. Part 19—Reports

CEA Section 4i authorizes the Commission to require the filing of reports, as described in CEA section 4g, when positions equal or exceed position limits. Current part 19 of the Commission's regulations sets forth these reporting requirements for persons holding or controlling reportable futures and option positions that constitute bona fide hedge positions as defined in § 1.3(z) and in markets with federal speculative position limits—namely those for grains, the soy complex, and cotton. Since having a bona fide hedge exemption affords a commercial market participant the opportunity to hold positions that exceed a position limit level, it is important for the Commission to be able to verify that when an exemption is invoked that it is done so for legitimate purposes. As such, commercial entities that hold positions in excess of those limits must file information on a monthly basis pertaining to owned stocks and purchase and sales commitments for entities that claim a bona fide hedging exemption.

In order to help ensure that the additional exemptions described in proposed § 150.3 are used in accordance with the requirements of the exemption employed, as well as obtain information necessary to verify that any futures, options and swaps positions established in referenced contracts are justified, the Commission proposes to make conforming and substantive amendments to part 19. First, the Commission proposes to amend part 19 by adding new and modified cross-references to proposed part 150, including the new definition of bona fide hedging position in proposed § 150.1.[809] Second, the Commission proposes to amend § 19.00(a) by extending reporting requirements to any person claiming any exemption from federal position limits pursuant to proposed § 150.3. The Commission proposes to add three new series '04 reporting forms to effectuate these additional reporting requirements. Third, the Commission proposes to update the manner of part 19 reporting. Lastly, the Commission proposes to update both the type of data that would be required in series '04 reports, as well as the time allotted for filing such reports.

i. Rule Summary

a. Extension of Reporting Requirements

Proposed part 19 will be expanded to include reporting requirements for positions in swaps, in addition to futures and options positions, for any instance in which a person relies on an exemption. Therefore, positions in ''commodity derivative contracts,'' as defined in proposed § 150.1, would replace ''futures and option positions'' throughout amended part 19 as shorthand for any futures, option, or swap contract in a commodity (other than a security futures product as defined in CEA section 1a(45)).[810]

The Commission also proposes to extend the reach of part 19 by requiring all persons who avail themselves of any exemption from federal position limits under proposed § 150.3 to file applicable series '04 reports.[811] The list of positions set forth in proposed § 150.3 that are eligible for exemption from the federal position includes, but is not limited to, bona fide hedging positions (including pass-through swaps and anticipatory bona fide hedge positions), qualifying spot month positions in cash-settled referenced contracts, and qualifying non-enumerated risk-reducing transactions.

The Commission currently requires two monthly reports, CFTC Forms 204 and 304, which are listed in current § 15.02.[812] The reports, collectively referred to as the Commission's ''series '04 reports,'' show a trader's positions in the cash market and are used by the Commission to determine whether a trader has sufficient cash positions that justify futures and option positions above the speculative limits. CFTC Form 204 is the Statement of Cash Positions in Grains, which includes the soy complex, and CFTC Form 304 Report is the Statement of Cash

[809] These amendments are non-substantive conforming amendments and should not have implications for the Commission's consideration of costs and benefits.

[810] *See supra* discussion of proposed amendments to part 19.

[811] Furthermore, anyone exceeding the federal limits who has received a special call must file a series '04 form.

[812] 17 CFR 15.02.

Positions in Cotton.[813] The Commission proposes to add three new series '04 reporting forms to effectuate the expanded reporting requirements of part 19. Proposed CFTC Form 504, Statement of Cash Positions for Conditional Spot Month Exemptions, would be added for use by persons claiming the conditional spot month limit exemption pursuant to proposed § 150.3(c). Proposed CFTC Form 604, Statement of Counterparty Data for Pass-Through Swap Exemptions, would be added for use by persons claiming a bona fide hedge exemption for either of two specific pass-through swap position types, as discussed further below. Proposed CFTC Form 704, Statement of Anticipatory Bona Fide Hedge Exemptions, would be added for use by persons claiming a bona fide hedge exemption for certain anticipatory bona fide hedging positions.

b. Manner of Reporting

For purposes of reporting cash market positions under current part 19, the Commission historically has allowed a reporting trader to ''exclude certain products or byproducts in determining his cash positions for bona fide hedging'' if it is ''the regular business practice of the reporting trader'' to do so.[814] Nevertheless, the Commission believes that an entity, when calculating the value that is subject to risks from a source commodity in order to establish a long derivatives position as a hedge for unfilled anticipated requirements, need take into account large quantities of a source commodity that it may hold in inventory. Under proposed § 19.00(b)(1), a source commodity itself can only be excluded from a calculation of a cash position if the amount is de minimis, impractical to account for, and/or on the opposite side of the market from the market participant's hedging position.[815]

Persons who wish to avail themselves of cross-commodity hedges are required to file an appropriate series '04 form. Proposed § 19.00(b)(2) sets forth instructions, which are consistent with the provisions in the current section, for reporting a cash position in a commodity that is different from the commodity underlying the futures contract used for hedging.[816] Since proposed § 19.00(b)(3) would maintain the requirement that cross-hedged positions be shown both in terms of the equivalent amount of the commodity underlying the commodity derivative contract used for hedging and in terms of the actual cash commodity (as provided for on the appropriate series '04 form), the Commission will be able to determine the hedge ratio used merely by comparing the reported positions. Thus, the Commission will be positioned to review whether a hedge ratio appears reasonable in comparison to, for example, other similarly situated traders.

Proposed § 19.00(b)(3) maintains the requirement that standards and conversion factors used in computing cash positions for reporting purposes must be made available to the Commission upon request. Proposed § 19.00(b)(3) would clarify that such information would include hedge ratios used to convert the actual cash commodity to the equivalent amount of the commodity underlying the commodity derivative contract used for hedging, and an explanation of the methodology used for determining the hedge ratio.

c. Bona Fide Hedgers and Cotton Merchants and Dealers

Current § 19.01(a) sets forth the data that must be provided by bona fide hedgers (on Form 204) and by merchants and dealers in cotton (on Form 304). The Commission proposes to continue using Forms 204 and 304, with minor changes to the types of data to be reported.[817] Form 204 will be expanded to incorporate, in addition to all other positions reportable under proposed § 19.00(a)(1)(iii), monthly reporting for cotton, including the granularity of equity, certificated and non-certificated cotton stocks of cotton. Weekly reporting for cotton will be retained as a separate report made on Form 304 for the collection of data required by the Commission to publish its weekly public cotton ''on call'' report on *www.cftc.gov*.

Proposed § 19.01(b) would maintain the requirement that reports on Form 204 be submitted to the Commission on a monthly basis, as of the close of business on the last Friday of the month.

d. Conditional Spot-Month Limit Exemption

Proposed § 19.01(a)(1) would require persons availing themselves of the conditional spot month limit exemption for natural gas (pursuant to proposed § 150.3(c)) to report certain detailed information concerning their cash market activities. While traders could not directly influence the settlement price in the physical-delivery referenced contract due to the prohibition of holding physical-delivery contract positions when invoking the conditional spot month exemption, there is no similar restriction on holding the underlying cash commodity. While the Commission is concerned about traders' activities in the underlying cash market of any derivative contract, it is particularly concerned with respect to natural gas where there is an existing conditional spot-month limit exemption. Accordingly, proposed § 19.01(b) would require that persons claiming a conditional spot month limit exemption must report on new Form 504 daily, by 9 a.m. Eastern Time on the next business day, for each day that a person is over the spot month limit in certain commodity contracts specified by the Commission. The scope of reporting—purchase and sales contracts through the delivery area for the core referenced futures contract and inventory in the delivery area—differs from the scope of reporting for bona fide hedgers, since the person relying on the conditional spot month limit exemption need not be hedging a position.

Initially, the Commission would require reporting on new Form 504 for exemptions in the natural gas commodity derivative contracts only.[818] The Commission requests comment as to whether the costs and benefits of the enhanced reporting regime support imposing this requirement on additional commodity markets before gaining

[813] *See supra* discussion of series '04 forms.

[814] *See* 17 CFR 19.00(b)(1) (providing that ''[i]f the regular business practice of the reporting trader is to exclude certain products or byproducts in determining his cash position for bona fide hedging . . . , the same shall be excluded in the report'').

[815] Proposed § 19.00(b)(1) adds a caveat to the alternative manner of reporting: when reporting for the cash commodity of soybeans, soybean oil, or soybean meal, the reporting person shall show the cash positions of soybeans, soybean oil and soybean meal. This proposed provision for the soybean complex is included in the current instructions for preparing Form 204.

[816] Proposed § 19.00(b)(2) would add the term commodity derivative contracts (as defined in proposed § 150.1). The proposed definition of cross-commodity hedge in proposed § 150.1 is discussed *above.*

[817] The list of data required for persons filing on Forms 204 and 304 would be relocated from current § 19.01(a) to proposed § 19.01(a)(3).

[818] The Commission believes that enhanced reporting for natural gas contracts is warranted based on its experience in surveillance of natural gas commodity derivative contracts. Absent experiential evidence of current need beyond the natural gas realm, the Commission proposes to initially not impose reporting requirements for persons claiming conditional spot month limit exemptions in other commodity derivative contracts until the Commission gains additional experience with the limits in proposed § 150.2. However, the Commission retains its authority to issue ''special calls'' under § 18.05. The Commission will closely monitor the reporting associated with conditional spot-month limit exemptions in natural gas, as well as other information available to the Commission for other commodities, and may require reporting on Form 504 for other commodity derivative contracts in the future.

additional experience with this exemption in other commodities.

e. Pass-Through Swap Exemption

Under the definition of bona fide hedging position in proposed § 150.1, a person who uses a swap to reduce risks attendant to a position that qualifies for a bona fide hedging transaction may pass-through those bona fides to the counterparty, even if the person's swap position is not in excess of a position limit.[819] As such, positions in commodity derivative contracts that reduce the risk of pass-through swaps would qualify as bona fide hedging transactions.

Proposed § 19.01(a)(2) would require a person relying on the pass-through swap exemption who holds either of two position types to file a report with the Commission on new form 604. The first type of position is a swap executed opposite a bona fide hedger that is not a referenced contract and for which the risk is offset with referenced contracts. The second type of position is a cash-settled swap executed opposite a bona fide hedger that is offset with physical-delivery referenced contracts held into a spot month, or, vice versa, a physical-delivery swap executed opposite a bona fide hedger that is offset with cash-settled referenced contracts held into a spot month.

The information reported on Form 604 would explain hedgers' needs for large referenced contract positions and would give the Commission the ability to verify that the positions were a bona fide hedge, with heightened daily surveillance of spot month offsets. Persons holding any type of pass-through swap position other than the two described above would report on form 204.[820]

f. Swap Off-Sets

Proposed § 19.01(a)(2)(i) lists the types of data that a person who executes a pass-through swap that is not a referenced contract and for which the risk is offset with referenced contracts must report on new Form 604. Under proposed § 19.01(b), persons holding non-referenced contract swap offset would submit reports to the Commission on a monthly basis, as of the close of business of the last Friday of the month. This data collection would permit staff to identify offsets of non-referenced-contract pass-through swaps on an ongoing basis for further analysis.

Under proposed § 150.2(a), a trader in the spot month may not net across physical-delivery and cash-settled contracts for the purpose of complying with federal position limits.[821] If a person executes a cash-settled pass-through swap that is offset with physical-delivery contracts held into a spot month (or vice versa), then, pursuant to proposed § 19.01(a)(2)(ii), that person must report additional information concerning the swap and offsetting referenced contract position on new Form 604. Pursuant to proposed § 19.01(b), a person holding a spot month swap offset would need to file on form 604 as of the close of business on each day during a spot month, and not later than 9 a.m. Eastern Time on the next business day following the date of the report. The Commission notes that pass-through swap offsets would not be permitted during the lesser of the last five days of trading or the time period for the spot month. However, the Commission remains concerned that a trader could hold an extraordinarily large position early in the spot month in the physical-delivery contract along with an offsetting short position in a cash-settled contract. Hence, the Commission proposes to introduce this new daily reporting requirement within the spot month to identify and monitor such offsetting positions.

ii. Benefits

The reporting requirements allow the Commission to obtain the information necessary to verify whether the relevant exemption requirements are fulfilled in a timely manner. This is needed for the Commission to help ensure that any person who claims any exemption from federal speculative position limits can demonstrate a legitimate purpose for doing so. In the absence of the reporting requirements detailed in proposed part 19, the Commission would lack critical tools to identify abuses related to the exemptions afforded in proposed § 150.3 in a timely manner and refer them to enforcement. As such, the reporting requirements are necessary for the Commission to be able to perform its essential surveillance functions. These reporting requirements therefore promote the Commission's ability to achieve, to the maximum extent practicable, the statutory factors outlined by Congress in CEA section 4a(a)(3).

The Commission requests comment on its considerations of the benefits of reporting under part 19. Has the Commission accurately identified the benefits of collecting the reported information? Are there additional benefits the Commission should consider?

iii. Costs

The Commission recognizes there will be costs associated with the proposed changes and additions to the report filing requirements under part 19. Though the Commission anticipates that market participants should have ready access to much of the required information, the Commission expects that, at least initially, market participants will require additional time and effort to become familiar with new and amended series '04 forms, to gather the necessary information in the required format, and to file reports in the proposed timeframes. The Commission has attempted to mitigate the cost impacts of these reports.

Actual costs incurred by market participants will vary depending on the diversity of their cash market positions, the experience that the participants currently have regarding filing Form 204 and Form 304 as well as a variety of other organizational factors. However, the Commission has estimated average incremental burdens associated with the proposed rules in order to fulfill its obligations under the PRA.[822]

For Form 204, the Commission estimates that approximately 400 market participants will file an average of 12 reports annually at an estimated labor burden of 2 hours per response for a total per-entity hour burden of approximately 24 hours, which computes to a total annual burden of 9,600 hours for all affected entities. Using an estimated hourly wage of $120 per hour,[823] the Commission estimates

[819] *See supra* discussion of definition of bona fide hedging position in proposed § 150.1.

[820] Persons holding pass-through swap positions that are offset with referenced contracts outside the spot month (whether such contracts are for physical delivery or are cash-settled) need not report on Form 604 because swap positions will be netted with referenced contract positions outside the spot month pursuant to proposed § 150.2(b).

[821] *See supra* discussion of proposed § 150.2.

[822] *See* PRA section below for full details on the Commission's estimates.

[823] The Commission's estimates concerning the wage rates are based on 2011 salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA''). The Commission is using $120 per hour, which is derived from a weighted average of salaries across different professions from the SIFMA Report on Management & Professional Earnings in the Securities Industry 2011, modified to account for an 1800-hour work-year, adjusted to account for the average rate of inflation in 2012, and multiplied by 1.33 to account for benefits and 1.5 to account for overhead and administrative expenses. The Commission anticipates that compliance with the provisions would require the work of an information technology professional; a compliance manager; an accounting professional; and an associate general counsel. Thus, the wage rate is a weighted national average of salary for professionals with the following titles (and their

Continued

an annual per-entity cost of approximately $2,900 and a total annual cost of $1,152,000 for all affected entities.

For Form 304, the Commission estimates that approximately 400 market participants will file an average of 52 reports annually at an estimated labor burden of 1 hours per response for a total per-entity hour burden of approximately 52 hours, which computes to a total annual burden of 20,800 hours for all affected entities. Using an estimated hourly wage of $120 per hour,[824] the Commission estimates an annual per-entity cost of approximately $6,300 and a total annual cost of $2,500,000 for all affected entities.

For the new Form 504, the Commission anticipates that approximately 40 market participants will file an average of 12 reports annually at an estimated labor burden of 15 hours per response for a total per-entity hour burden of approximately 180 hours, which computes to a total annual burden of 7,200 hours for all affected entities. Using an estimated hourly wage of $120 per hour,[825] the Commission estimates an annual per-entity cost of approximately $10,800 and a total annual cost of $864,000 for all affected entities.

For the new Form 604, the Commission anticipates that approximately 200 market participants will file an average of 10 reports annually at an estimated labor burden of 30 hours per response for a total per-entity hour burden of approximately 300 hours, which computes to a total annual burden of 60,000 hours for all affected entities. Using an estimated hourly wage of $120 per hour,[826] the Commission estimates an annual per-entity cost of approximately $36,000 and a total annual cost of $7,200,000 for all affected entities.

Finally, for the new Form 704, the Commission anticipates that approximately 200 market participants will file an average of 10 reports annually at an estimated labor burden of 20 hours per response for a total per-entity hour burden of approximately 200 hours, which computes to a total annual burden of 40,000 hours for all affected entities. Using an estimated hourly wage of $120 per hour,[827] the Commission estimates an annual per-entity cost of approximately $24,000 and a total annual cost of $4,800,000 for all affected entities.

The Commission requests comment regarding its consideration of costs pertaining to the amendments to part 19. Has the Commission accurately described the ways that market participants may incur costs? Are there other costs, direct or indirect, that the Commission should consider regarding the proposed part 19? How does the introduction of the new series '04 reports affect the likelihood that a trader may seek an exemption? What other burdens may arise from the filing of these reports? Are the Commission's burden estimates under the PRA reasonable? Why or why not? Commenters are encouraged to submit their own estimates of costs, including labor burdens and wage estimates, for the Commission's consideration.

iv. Consideration of Alternatives

The Commission also recognizes that alternatives may exist to discretionary elements of the part 19 reporting amendments proposed herein. The Commission requests comments on whether an alternative to what is proposed would result in a superior benefit-cost profile, with support for any such position provided.

8. CEA Section 15(a)

As described above, the Commission interprets the revised CEA section 4a as requiring the imposition of speculative position limits during the spot-month, any single month, and all-months-combined on all commodity derivative contracts, including swaps, that reference the same underlying physical commodity on an aggregated basis across trading venues. Section 15(a) of the Act requires the Commission to evaluate the costs and benefits of its discretionary actions in light of five enumerated factors that represent broad areas of market and public concern. The Commission welcomes comment on its evaluation under CEA section 15(a).

i. Protection of Market Participants and the Public

Broadly speaking, the Commission's expansion of the federal speculative position limits regime to include an additional 19 core-referenced futures contracts (and the associated referenced contracts) will extend protections afforded to the existing legacy contracts. Namely, the limits are intended as a measure to prophylactically deter manipulation and to diminish, eliminate, or prevent excessive speculation in significant price discovery contracts. The proposed limits in § 150.2, the methodology used for determining limits at the spot, single and all-months combined levels and the determination of distinct levels in physically-delivered and cash-settled contracts all support the Commission's mission to prevent undue or unnecessary burdens on interstate commerce resulting from excess speculation such as the sudden or unreasonable fluctuations or unwarranted changes in commodity prices. Further, by requiring that market participants who avail themselves of the exemptions offered under § 150.3 document their exemption eligibility and make such records available on request and through regular reporting to the Commission, the Commission is protecting market participants—hedgers and speculators alike—from another party abusing the exemptions reserved for eligible entities.

The Commission anticipates that market participants engaged in speculative trading will incur costs to monitor their positions vis-a-vis limit levels. The Commission expects that market participants will need to invest additional time and effort to become familiar with new and amended series '04 forms, to gather the necessary information in the required format, and to file reports in the proposed timeframes.

ii. Efficiency, Competitiveness, and Financial Integrity of Markets

Position limits help to prevent market manipulation or excessive speculation that may unduly influence prices at the expense of the efficiency and integrity of markets. The expansion of the federal position limits regime to 28 core referenced futures contracts enhances the buffer against excessive speculation historically afforded to the nine legacy contracts exclusively, improving the financial integrity of those markets. Moreover, the proposed limits in § 150.2 promote market competitiveness by preventing a trader from gaining too much market power.

The stringently defined exemptions in § 150.3 and the reporting requirements assigned to those availing themselves of the exemptions provided are the Commission's first line of defense in ensuring that participants transacting in the Commission's jurisdictional markets are doing so in a competitive and efficient environment.

In codifying the Commission's historical practice of temporarily lifting position limit restrictions, the proposed

relative weight); ''programmer (senior)'' and ''programmer (non-senior)'' (15% weight), ''senior accountant'' (15%) ''compliance manager'' (30%), and ''assistant/associate general counsel'' (40%). All monetary estimates have been rounded to the nearest hundred dollars.

[824] *Id.*

[825] *Id.*

[826] *Id.*

[827] *Id.*

§ 150.3(b) financial distress exemption strengthens the benefits of accommodating transfers of positions from financially distressed firms to financially secure firms or facilitating other necessary remediation measures during times of market stress. In addition, it provides market participants with a degree of confidence which contributes to the overall efficiency and financial integrity of markets.

iii. Price Discovery

Market manipulation or excessive speculation may result in artificial prices. So, in this sense, position limits might also help to prevent the price discovery function of the underlying commodity markets from being disrupted. On the other hand, imposing position limits raises the concerns that liquidity and price discovery may be diminished, because certain market segments, *i.e.,* speculative traders, are restricted. However, the Commission has mitigated some of these concerns by proposing various exemptions to positions limits. In addition, applying current DCM-set limits as federal limits means that even though additional contract markets will be brought into the federal position limits regime, the activity of speculative traders, at least initially, will be no less restricted than under the current regime.

iv. Sound Risk Management

Proposed exemptions for bona fide hedgers help to ensure that market participants with positions that are hedging legitimate commercial needs are properly recognized as hedgers under the Commission's speculative position limits regime. This promotes sound risk management practices. In addition, the Commission has crafted the proposed rules to ensure sufficient market liquidity for bona fide hedgers to the maximum extent practicable, *e.g.,* through the conditional spot month limit exemption.

To the extent that monitoring for position limits requires market participants to create internal risk limits and evaluate position size in relation to the market, position limits may also provide an incentive for market participants to engage in sound risk management practices.

v. Other Public Interest Considerations

The regulations proposed under § 150.5 require that exchange-set limits employ policies that conform to the Commission's general policy both for contracts that are subject to federal limits under § 150.2 and those that are not, thus harmonizing rules for all federal and exchange-set speculative position limits.

B. Paperwork Reduction Act

1. Overview

The PRA [828] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of the regulations proposed herein will result in amendments to approved collection of information requirements within the meaning of the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (''OMB''). Therefore, the Commission is submitting this proposal to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The information collection requirements proposed in this proposal would amend previously-approved collections associated with OMB control numbers 3038–0009 and 3038–0013.

If adopted, responses to these collections of information would be mandatory. Several of the reporting requirements are mandatory in order to obtain exemptive relief, and are thus mandatory under the PRA to the extent a market participant elects to seek such relief. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, headed ''Commission Records and Information.'' In addition, the Commission emphasizes that section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' [829] The Commission also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974.[830]

Under the proposed regulations, market participants with positions in a ''referenced contract,'' as defined in proposed § 150.1, would be subject to the position limit framework established under the proposed revisions to parts 19 and 150. Proposed part 19 prescribes new forms and reporting requirements for persons claiming a conditional spot month limit exemption (proposed Form 504),[831] a pass-through swap exemption (proposed Form 604),[832] or an anticipatory exemption (proposed Form 704).[833] The proposed amendments to part 19 also update and change reporting obligations and required information for Form 204 and Form 304.[834] Proposed part 150 prescribes reporting requirements for DCMs listing a core referenced futures contract [835] and traders who wish to apply for an exemption from DCM- or SEF-established positions limits in non-referenced contracts,[836] as well as recordkeeping requirements for persons who claim exemptions from position limits or are counterparties to a person claiming a pass-through swap offset.[837]

2. Methodology and Assumptions

It is not possible at this time to precisely determine the number of respondents affected by the proposed rules. Many of the regulations that impose PRA burdens are exemptions that a market participant may elect to take advantage of, meaning that without intimate knowledge of the day-to-day business decisions of all its market participants, the Commission could not know which participants, or how many, may elect to obtain such an exemption. Further, the Commission is unsure of how many participants not currently in the market may be required to or may elect to incur the estimated burdens in the future. Finally, many of the regulations proposed herein are applying to participants in swaps markets for the first time, and, as explained *supra,* the Commission's lack of experience with such markets and with many of the participants therein hinders its ability to determine with precision the number of affected entities.

These limitations notwithstanding, the Commission has made best-effort estimations regarding the likely number of affected entities for the purposes of calculating burdens under the PRA. The Commission used its proprietary data, collected from market participants, to estimate the number of respondents for each of the proposed obligations subject to the PRA. As discussed *supra,*[838] the

[828] 44 U.S.C. 3501 *et seq.*

[829] 7 U.S.C. 12(a)(1).

[830] 5 U.S.C. 552a.

[831] *See* proposed §§ 19.00(a)(1)(i) and 19.01(a)(1).

[832] *See* proposed §§ 19.00(a)(1)(ii) and 19.01(a)(2).

[833] The requirement of filing a Form 704 in order to claim an anticipatory exemption is stipulated in proposed § 150.7(a) in addition to its inclusion in proposed amendments to part 19. *See* proposed §§ 19.00(a)(1)(iv), 19.01(a)(4) and 150.7(a).

[834] *See* proposed § 19.01(a)(3).

[835] *See* proposed § 150.2(e)(3)(ii).

[836] *See* proposed § 150.5(b)(5)(C).

[837] *See* proposed § 150.3(g).

[838] *See supra* discussion of number of traders over the limits.

Commission analyzed data covering the two year period 2011–2012 to determine how many participants would be over 60, 80, or 100 percent of the proposed limit levels in each of the 28 core referenced futures contracts, were such limit levels to be adopted as proposed.

For purposes of the PRA, Commission staff determined the number of unique traders over the proposed spot-month position limit level for all of the 28 core referenced futures contracts combined. The Commission also determined the number of traders over the non-spot-month position limit level for all of the 28 core referenced futures contracts combined. Staff then added those two figures and rounded it up to the nearest hundred to arrive at an approximation of 400 persons.[839] This base figure was then scaled to estimate, based on the Commission's expertise and experience in the administration of position limits, how many participants may be affected by each specific provision. The analysis reviewed by the Commission does not account for hedging and other exemptions from position limits, which leads the Commission to believe that the approximate number of traders in excess of the limits is a very conservative estimate. The Commission welcomes comment on its estimates, the methodology described above, and its conclusion regarding the conservativeness of its estimates.

The Commission's estimates concerning wage rates are based on 2011 salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA''). The Commission is using a figure of $120 per hour, which is derived from a weighted average of salaries across different professions from the SIFMA Report on Management & Professional Earnings in the Securities Industry 2011, modified to account for an 1800-hour work-year, adjusted to account for the average rate of inflation in 2012. This figure was then multiplied by 1.33 to account for benefits[840] and further by 1.5 to account for overhead and administrative expenses.[841] The Commission anticipates that compliance with the provisions would require the work of an information technology professional; a compliance manager; an accounting professional; and an associate general counsel. Thus, the wage rate is a weighted national average of salary for professionals with the following titles (and their relative weight); ''programmer (average of senior and non-senior)'' (15% weight), ''senior accountant'' (15%) ''compliance manager'' (30%), and ''assistant/associate general counsel'' (40%). All monetary estimates have been rounded to the nearest hundred dollars. The Commission welcomes public comment on its assumptions regarding its estimated hourly wage.

3. Information Provided by Reporting Entities/Persons and Recordkeeping Duties

For purposes of assisting the Commission in setting spot-month limits no less frequently than every two years, proposed § 150.2(e)(3)(ii) adds an additional burden cost to information collection 3038–0013 by requiring DCMs to supply the Commission with an estimated spot-month deliverable supply for each core referenced futures contract listed. The estimate must include documentation as to the methodology used in deriving the estimate, including a description and any statistical data employed. The Commission estimates that the submission would require a labor burden of approximately 20 hours per estimate. Thus, a DCM that submits one estimate may incur a burden of 20 hours for a cost, using the estimated hourly wage of $120, of approximately $2,400. DCMs that submit more than one estimate may multiply this per-estimate burden by the number of estimates submitted to obtain an approximate total burden for all submissions, subject to any efficiencies and economies of scale that may result from submitting multiple estimates. The Commission welcomes comment regarding the estimated burden on DCMs that will result from proposed § 150.2(e).

Proposed § 150.3(g)(1) adds an additional burden cost to information collection 3038–0013 by requiring any person claiming an exemption from federal position limits under part 150 to keep and maintain books and records concerning all details of their related cash, forward, futures, options and swap positions and transactions to serve as a reasonable basis to demonstrate reduction of risk on each day that the exemption was claimed. These records must be comprehensive, in that they must cover anticipated requirements, production and royalties, contracts for services, cash commodity products and by-products, and cross-commodity hedges. Proposed § 150.3(g)(2) requires any person claiming a pass-through swap offset hedging exemption to obtain a representation that the swap qualifies as a pass-through swap for purposes of a bona fide hedging position. Additionally, proposed § 150.3(g)(3) requires any person representing to another person that a swap qualifies as a pass-through swap for purposes of a bona fide hedging position, to keep and make available to the Commission upon request all relevant books and records supporting such a representation for at least two years following the expiration of the swap.

The Commission estimates that approximately 400 traders will claim an average of 50 exemptions each per year that fall within the scope of the recordkeeping requirements of proposed § 150.3(g). At approximately one hour per exemption claimed to keep and maintain the required books and records, the Commission estimates that industry will incur a total of 20,000 annual labor hours amounting to $2,400,000 in additional labor costs. The Commission requests public comment regarding the burden associated with the recordkeeping requirements of proposed § 150.3(g) and its estimates thereto.

Proposed § 150.5(b)(5)(iii) adds an additional burden cost to information collection 3038–0013 by requiring traders who wish to avail themselves of any exemption from a DCM or SEF's speculative position limit rules that is allowed for under § 150.5(b)(5)(A)–(B) to submit an application to the DCM or SEF explaining how the exemption would be in accord with sound commercial practices and would allow for a position that could be liquidated in an orderly fashion. As noted supra, the Commission understands that requiring traders to apply for exemptive relief comports with existing DCM practice; thus, the Commission anticipates that the codification of this requirement will have the practical effect of incrementally increasing, rather than creating, the burden of applying for such exemptive relief. The Commission estimates that approximately 400 traders will claim exemptions from DCM or

[839] Staff believes that such rounding preserves the reasonability of the estimate without creating a false impression of precision.

[840] The Bureau of Labor Statistics reports that an average of 32.8% of all compensation in the financial services industry is related to benefits. This figure may be obtained on the Bureau of Labor Statistics Web site, at *http://www.bls.gov/news.release/ecec.t06.htm.* The Commission rounded this number to 33% to use in its calculations.

[841] Other estimates of this figure have varied dramatically depending on the categorization of the expense and the type of industry classification used (see, *e.g.,* BizStats at *http://www.bizstats.com/corporation-industry-financials/finance-insurance-52/securities-commodity-contracts-other-financial-investments-523/commodity-contracts-dealing-and-brokerage-523135/show* and Damodaran Online at *http://pages.stern.nyu.edu/~adamodar/pc/datasets/uValuedata.xls*) The Commission has chosen to use a figure of 50% for overhead and administrative expenses to attempt to conservatively estimate the average for the industry.

SEF-established speculative position limits each year, with each trader on average making 100 related submissions to the DCM or SEF each year. Each submission is estimated to take 2 hours to complete and file, meaning that these traders would incur a total burden of 80,000 labor hours per year for an industry-wide additional labor cost of $9,600,000. The Commission welcomes all comment regarding the estimated burden on market participants wishing to avail themselves of a DCM or SEF exemption.

Proposed § 19.01(a)(1) adds an additional burden cost to information collection 3038–0009 for persons claiming a conditional spot month limit exemption pursuant to § 150.3(c), by requiring the filing of Form 504 for special commodities so designated by the Commission under § 19.03. A Form 504 filing shows the composition of the cash position of each commodity underlying a referenced contract that is held or controlled for which the exemption is claimed,[842] including the ''as of'' date, the quantity of stocks owned of such commodity, the quantity of fixed-price purchase commitments open providing for receipt of such cash commodity, the quantity of fixed-price sale commitments open providing for delivery of such cash commodity, the quantity of unfixed-price purchase commitments open providing for receipt of such cash commodity, and the quantity of unfixed-price sale commitments open providing for delivery of such cash commodity. The Commission estimates that approximately 40 traders will claim a conditional spot month limit 12 times per year, and each corresponding submission will take 15 labor hours to complete and file. Therefore, the Commission estimates that the Form 504 reporting requirement will result in approximately 7,200 total annual labor hours for an additional industry-wide labor cost of $864,000. The Commission requests comment on its estimates regarding new Form 504. In particular, the Commission welcomes comment regarding the number of entities who may partake of the conditional limit in natural gas and would thus be required to file Form 504.

Proposed § 19.01(a)(2) adds an additional burden cost to information collection 3038–0009 by requiring persons claiming a pass-through swap exemption pursuant to § 150.3(a)(1)(i) to file Form 604 showing various data depending on whether the offset is for non-referenced contract swaps or spot-month swaps including, at a minimum, the underlying commodity or commodity reference price, the applicable clearing identifiers, the notional quantity, the gross long or short position in terms of futures-equivalents in the core referenced futures contracts, and the gross long or short positions in the referenced contract for the offsetting risk position. The Commission estimates that approximately 200 traders will claim a pass-through swap exemption an average of ten times per year each. At approximately 30 labor hours to complete each corresponding submission for a total burden to traders of 60,000 annual labor hours, compliance with the Form 604 filing requirements industry-wide will impose an additional $7,200,000 in labor costs. The Commission requests comment on its estimates regarding new Form 604. In particular, the Commission welcomes comment regarding the number of entities who may utilize the pass-through swap exemption and the burden incurred to file Form 604.

Proposed § 19.01(a)(3) increases existing burden costs previously approved under information collection 3038–0009 by expanding the number of cash commodities that existing Form 204 covers. Additionally, proposed § 19.01(a)(3) requires additional data to be reported on Form 204 and proposed § 19.02 requires additional data to be reported on existing Form 304 (call cotton). Both forms are required to be filed when a trader accumulates a net long or short commodity derivative position in a core referenced futures contract that exceeds a federal limit, and inform the Commission of the trader's cash positions underlying those commodity derivative contracts for purposes of claiming bona fide hedging exemptions.

The Commission estimates that approximately 400 traders will be required to file Form 204 12 times per year each. At an estimated two labor hours to complete and file each Form 204 report for a total annual burden to industry of 9,600 labor hours, the Form 204 reporting requirement will cost industry $1,200,000 in labor costs. The Commission also estimates that approximately 400 traders will be required to make a Form 304 submission for call cotton 52 times per year each. At one hour to complete each submission (representing a net increase of a half hour from the previous estimate) for a total annual burden to industry of 20,800 labor hours, the Form 304 reporting requirement will impose upon industry $2,500,000 in labor costs. Previously, the Commission estimated the combined annual labor hours for both forms to be 1,350 hours, which amounted to a total labor cost to industry of $68,850 per annum.[843] Therefore, the Commission is increasing its net estimate of labor hours and costs associated with existing Form 204 and Form 304 for collection 3038–0009 by 30,400 hours and $3,700,000.[844] The Commission requests comment with respect to its estimates regarding the increased number of entities and additional information required to file Forms 204 and 304.

Proposed § 19.01(a)(4) adds an additional burden cost to information collection 3038–0009 by requiring traders claiming anticipatory exemptions to file Form 704 for the initial statement pursuant to § 150.7(d), the supplemental statement pursuant to § 150.7(e), and the annual update pursuant to § 150.7(f), as well as Form 204 monthly reporting the remaining unsold, unfilled and other anticipated activity for the Specified Period in Form 704, Section A. The Commission estimates that approximately 200 traders will claim anticipatory exemptions every year an average of 10 times each. At an estimated 20 labor hours to complete and file Form 704 for a total annual burden to traders of 40,000 labor hours, the anticipatory exemption filing requirement will cost industry an additional $4,800,000 in labor costs. The Commission requests comment on its estimates regarding new Form 704. In particular, the Commission welcomes comment regarding the number of entities who may utilize the anticipatory hedge exemption and the burden incurred to file Form 704.

4. Comments on Information Collection

The Commission invites the public and other federal agencies to submit comments on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (1) Evaluate

[842] The Commission proposes that initially only the natural gas commodity derivative contracts would be designated under § 19.03 for Form 504 reporting. As such, the Commission's estimates reflect only the burden for traders in that commodity. The Commission is not able to estimate the expanded cost of any future Commission determination to designate another commodity under § 19.03 as a special commodity for which Form 504 filings would be required. *See supra* discussion regarding the proposed conditional spot month limit.

[843] This estimate was based upon an average wage rate of $51 per hour. Adjusted to the hourly wage rate used for purposes of this PRA estimate, the previous total labor cost would have been $202,500.

[844] The Commission notes that the burdens associated with Forms 204 and 304 in collection 3038–0009 represent a fraction of the total burden under that collection.

whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology. Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by email at *OIRAsubmissions@omb.eop.gov*. Please provide the Commission with a copy of comments submitted so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice for comment submission instructions to the Commission. A copy of the supporting statements for the collection of information discussed above may be obtained by visiting *RegInfo.gov.* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is most assured of being fully considered if received by OMB (and the Commission) within 30 days after the publication of this notice of proposed rulemaking.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires that Federal agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.'' [845] A regulatory flexibility analysis or certification typically is required for ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to'' the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).[846] The requirements related to the proposed amendments fall mainly on registered entities, exchanges, futures commission merchants, swap dealers, clearing members, foreign brokers, and large traders.

The Commission has previously determined that registered DCMs, FCMs, SDs, MSPs, ECPs, SEFs, clearing members, foreign brokers and large traders are not small entities for purposes of the RFA.[847] While the requirements under the proposed rulemaking may impact non-financial end users, the Commission notes that position limits levels and filing requirements associated with bona fide hedging apply only to large traders, while requirements to keep records supporting a transaction's qualification for pass-through swap treatment incurs a marginal burden that is mitigated through overlapping recordkeeping requirements for reportable futures traders (current § 18.05) and reportable swap traders (current § 20.6(b)); furthermore, these records are ones that such entities maintain, as they would other documents evidencing material financial relationships, in the ordinary course of their businesses.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the actions proposed to be taken herein would not have a significant economic impact on a substantial number of small entities.''

IV. Appendices

Appendix A—Studies relating to position limits reviewed and evaluated by the Commission

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[845] 5 U.S.C. 601 *et seq.*

[846] 5 U.S.C. 601(2), 603–05.

[847] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619, Apr. 30, 1982 (DCMs, FCMs, and large traders) (''RFA Small Entities Definitions''); Opting Out of Segregation, 66 FR 20740, 20743, Apr. 25, 2001 (ECPs); Position Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 FR 71626, 71680, Nov. 18, 2011 (clearing members); Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33548, June 4, 2013 (SEFs); A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609, Aug. 29, 2001 (DCOs); Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, Jan. 19, 2012, (SDs and MSPs); and Special Calls, 72 FR 50209, Aug. 31, 2007 (foreign brokers).

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130. Westerhoff, Frank, ''Speculative Markets and the Effectiveness of Price Limits,'' December 1, 2003, Journal of Economic Dynamics and Control.

131. Wray, Randall, ''The Commodities Market Bubble: Money Manager Capitalism and the Financialization of Commodities,'' October 1, 2008, Public Policy Brief.

132. Wright, Brian, ''International Grain Reserves and Other Instruments to Address Volatility in Grain Markets,'' January 1, 2012, The World Bank Research Observer.

List of Subjects

17 CFR Part 1

Agricultural commodity, Agriculture, Brokers, Committees, Commodity futures, Conflicts of interest, Consumer protection, Definitions, Designated contract markets, Directors, Major swap participants, Minimum financial requirements for intermediaries, Reporting and recordkeeping requirements, Swap dealers, Swaps.

17 CFR Parts 15 and 17

Brokers, Commodity futures, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 19

Commodity futures, Cottons, Grains, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 32

Commodity futures, Consumer protection, Fraud, Reporting and recordkeeping requirements.

17 CFR Part 37

Registered entities, Registration application, Reporting and recordkeeping requirements, Swaps, Swap execution facilities.

17 CFR Part 38

Block transaction, Commodity futures, Designated contract markets, Reporting and recordkeeping requirements, Transactions off the centralized market.

17 CFR Part 140

Authority delegations (Government agencies), Conflict of interests, Organizations and functions (Government agencies).

17 CFR Part 150

Bona fide hedging, Commodity futures, Cotton, Grains, Position limits, Referenced Contracts, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR chapter I as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

■ 1. The authority citation for part 1 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 2a, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a–1, 7a–2, 7b, 7b–3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

§ 1.3 [Amended]

■ 2. Amend § 1.3 by removing and reserving paragraph (z).

§§ 1.47 and 1.48 [Removed and Reserved]

■ 3. Remove and reserve §§ 1.47 and 1.48.

PART 15—REPORTS—GENERAL PROVISIONS

■ 4. The authority citation for part 15 continues to read as follows:

Authority: 7 U.S.C. 2, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 9, 12a, 19, and 21, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 5. Amend § 15.00 by revising paragraph (p) to read as follows:

§ 15.00 Definitions of terms used in parts 15 to 19, and 21 of this chapter.

* * * * *

(p) *Reportable position* means:

(1) For reports specified in parts 17 and 18, and § 19.00(a)(2) and (3), of this chapter any open contract position that at the close of the market on any business day equals or exceeds the quantity specified in § 15.03 in either:

(i) Any one futures of any commodity on any one reporting market, excluding futures contracts against which notices of delivery have been stopped by a trader or issued by the clearing organization of a reporting market; or

(ii) Long or short put or call options that exercise into the same future of any commodity, or long or short put or call options for options on physicals that have identical expirations and exercise into the same physical, on any one reporting market.

(2) For the purposes of reports specified in § 19.00(a)(1) of this chapter, any position in commodity derivative contracts, as defined in § 150.1 of this chapter, that exceeds a position limit in § 150.2 of this chapter for the particular commodity.

* * * * *

■ 6. Amend § 15 .01 by revising paragraph (d) to read as follows:

§ 15.01 Persons required to report.

* * * * *

(d) Persons, as specified in part 19 of this chapter, either:

(1) Who hold or control commodity derivative contracts (as defined in § 150.1 of this chapter) that exceed a position limit in § 150.2 of this chapter for the commodities enumerated in that section; or

(2) Who are merchants or dealers of cotton holding or controlling positions for future delivery in cotton that equal or exceed the amount set forth in § 15.03.

■ 7. Revise § 15.02 to read as follows:

§ 15.02 Reporting forms.

Forms on which to report may be obtained from any office of the Commission or via the Internet (*http://www.cftc.gov*). Forms to be used for the filing of reports follow, and persons required to file these forms may be determined by referring to the rule listed in the column opposite the form number.

Form No.	Title	Rule
40	Statement of Reporting Trader	18.04
71	Identification of Omnibus Accounts and Sub-accounts	17.01
101	Positions of Special Accounts	17.00
102	Identification of Special Accounts, Volume Threshold Accounts, and Consolidated Accounts	17.01
204	Cash Positions of Hedgers (excluding Cotton)	19.00

Form No.	Title	Rule
304	Cash Positions of Cotton Traders	19.00
504	Cash Positions for Conditional Spot Month Exemptions	19.00
604	Counterparty Data for Pass-Through Swap Exemptions	19.00
704	Statement of Anticipatory Bona Fide Hedge Exemptions	19.00

(Approved by the Office of Management and Budget under control numbers 3038–0007, 3038–0009, and 3038–0103)

PART 17—REPORTS BY REPORTING MARKETS, FUTURES COMMISSION MERCHANTS, CLEARING MEMBERS, AND FOREIGN BROKERS

■ 8. The authority citation for part 17, as amended November 18, 2013, at 78 FR 69230, effective February 18, 2014, continues to read as follows:

Authority: 7 U.S.C. 2, 6a, 6c, 6d, 6f, 6g, 6i, 6t, 7, 7a, and 12a, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 9. Amend § 17.00 by revising paragraph (b) to read as follows:

§ 17.00 Information to be furnished by futures commission merchants, clearing members and foreign brokers.

* * * * *

(b) *Interest in or control of several accounts.* Except as otherwise instructed by the Commission or its designee and as specifically provided in § 150.4 of this chapter, if any person holds or has a financial interest in or controls more than one account, all such accounts shall be considered by the futures commission merchant, clearing member or foreign broker as a single account for the purpose of determining special account status and for reporting purposes.

* * * * *

■ 10. Amend § 17.03, as amended November 18, 2013, at 78 FR 69232, effective February 18, 2014, by adding paragraph (h) to read as follows:

§ 17.03 Delegation of authority to the Director of the Office of Data and Technology or the Director of the Division of Market Oversight.

* * * * *

(h) Pursuant to § 17.00(b), and as specifically provided in § 150.4 of this chapter, the authority shall be designated to the Director of the Division of Market Oversight to instruct an futures commission merchant, clearing member or foreign broker to consider as a single account for the purpose of determining special account status and for reporting purposes all accounts one person holds or controls, or in which the person has a financial interest.

■ 11. Revise part 19 to read as follows:

PART 19—REPORTS BY PERSONS HOLDING POSITIONS EXEMPT FROM POSITION LIMITS AND BY MERCHANTS AND DEALERS IN COTTON

Sec.
19.00 General provisions.
19.01 Reports on stocks and fixed price purchases and sales.
19.02 Reports pertaining to cotton on call purchases and sales.
19.03 Reports pertaining to special commodities.
19.04 Delegation of authority to the Director of the Division of Market Oversight.
19.05–19.10 [Reserved]
Appendix Appendix A to Part 19—Forms 204, 304, 504, 604, and 704

Authority: 7 U.S.C. 6g(a), 6a, 6c(b), 6i, and 12a(5), as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

§ 19.00 General provisions.

(a) *Who must file series '04 reports.* The following persons are required to file series '04 reports:

(1) *Persons filing for exemption to speculative position limits.* All persons holding or controlling positions in commodity derivative contracts, as defined in § 150.1 of this chapter, in excess of any speculative position limit provided under § 150.2 of this chapter and for any part of which a person relies on an exemption to speculative position limits under § 150.3 of this chapter as follows:

(i) *Conditional spot month limit exemption.* A conditional spot month limit exemption under § 150.3(c) of this chapter for any commodity specially designated by the Commission under § 19.03 for reporting;

(ii) *Pass-through swap exemption.* A pass-through swap exemption under § 150.3(a)(1)(i) of this chapter and as defined in paragraph (2)(ii) of the definition of ''bona fide hedging position'' in § 150.1 of this chapter, reporting separately for:

(A) *Non-referenced-contract swap offset.* A swap that is not a referenced contract, as that term is defined in § 150.1 of this chapter, and which is executed opposite a counterparty for which the swap would qualify as a bona fide hedging position and for which the risk is offset with a referenced contract; and

(B) *Spot-month swap offset.* A cash-settled swap, regardless of whether it is a referenced contract, executed opposite a counterparty for which the swap would qualify as a bona fide hedging position and for which the risk is offset with a physical-delivery referenced contract in its spot month;

(iii) *Other exemption.* Any other exemption from speculative position limits under § 150.3 of this chapter, including for a bona fide hedging position as defined in § 150.1 of this chapter or any exemption granted under § 150.3(b) or (d) of this chapter; or

(iv) *Anticipatory exemption.* An anticipatory exemption under § 150.7 of this chapter.

(2) *Persons filing cotton on call reports.* Merchants and dealers of cotton holding or controlling positions for futures delivery in cotton that are reportable pursuant to § 15.00(p)(1)(i) of this chapter; or

(3) *Persons responding to a special call.* All persons exceeding speculative position limits under § 150.2 of this chapter or all persons holding or controlling positions for future delivery that are reportable pursuant to § 15.00(p)(1) of this chapter who have received a special call for series '04 reports from the Commission or its designee. Persons subject to a special call shall file CFTC Form 204, 304, 504, 604 or 704 as instructed in the special call. Filings in response to a special call shall be made within one business day of receipt of the special call unless otherwise specified in the call. For the purposes of this paragraph, the Commission hereby delegates to the Director of the Division of Market Oversight, or to such other person designated by the Director, authority to issue calls for series '04 reports.

(b) *Manner of reporting.* The manner of reporting the information required in § 19.01 is subject to the following:

(1) *Excluding certain source commodities, products or byproducts of the cash commodity hedged.* If the regular business practice of the reporting person is to exclude certain source commodities, products or byproducts in determining his cash positions for bona fide hedging positions (as defined in § 150.1 of this chapter), the same shall be excluded in

the report, provided that the amount of the source commodity being excluded is de minimis, impractical to account for, and/or on the opposite side of the market from the market participant's hedging position. Such persons shall furnish to the Commission or its designee upon request detailed information concerning the kind and quantity of source commodity, product or byproduct so excluded. *Provided however,* when reporting for the cash commodity of soybeans, soybean oil, or soybean meal, the reporting person shall show the cash positions of soybeans, soybean oil and soybean meal.

(2) *Cross hedges.* Cash positions that represent a commodity, or products or byproducts of a commodity, that is different from the commodity underlying a commodity derivative contract that is used for hedging, shall be shown both in terms of the equivalent amount of the commodity underlying the commodity derivative contract used for hedging and in terms of the actual cash commodity as provided for on the appropriate series '04 form.

(3) *Standards and conversion factors.* In computing their cash position, every person shall use such standards and conversion factors that are usual in the particular trade or that otherwise reflect the value-fluctuation-equivalents of the cash position in terms of the commodity underlying the commodity derivative contract used for hedging. Such person shall furnish to the Commission upon request detailed information concerning the basis for and derivation of such conversion factors, including:

(i) The hedge ratio used to convert the actual cash commodity to the equivalent amount of the commodity underlying the commodity derivative contract used for hedging; and

(ii) An explanation of the methodology used for determining the hedge ratio.

§ 19.01 Reports on stocks and fixed price purchases and sales.

(a) *Information required.*—(1) *Conditional spot month limit exemption.* Persons required to file '04 reports under § 19.00(a)(1)(i) shall file CFTC Form 504 showing the composition of the cash position of each commodity underlying a referenced contract that is held or controlled including:

(i) The as of date;

(ii) The quantity of stocks owned of such commodity that either:

(A) Is in a position to be delivered on the physical-delivery core referenced futures contract; or

(B) Underlies the cash-settled core referenced futures contract;

(iii) The quantity of fixed-price purchase commitments open providing for receipt of such cash commodity in:

(A) The delivery period for the physical-delivery core referenced futures contract; or

(B) The time period for cash-settlement price determination for the cash-settled core referenced futures contract;

(iv) The quantity of unfixed-price sale commitments open providing for delivery of such cash commodity in:

(A) The delivery period for the physical-delivery core referenced futures contract; or

(B) The time period for cash-settlement price determination for the cash-settled core referenced futures contract;

(v) The quantity of unfixed-price purchase commitments open providing for receipt of such cash commodity in:

(A) The delivery period for the physical-delivery core referenced futures contract; or

(B) The time period for cash-settlement price determination for the cash-settled core referenced futures contract; and

(vi) The quantity of fixed-price sale commitments open providing for delivery of such cash commodity in:

(A) The delivery period for the physical-delivery core referenced futures contract; or

(B) The time period for cash-settlement price determination for the cash-settled core referenced futures contract.

(2) *Pass-through swap exemption.* Persons required to file '04 reports under § 19.00(a)(1)(ii) shall file CFTC Form 604:

(i) *Non-referenced-contract swap offset.* For each swap that is not a referenced contract and which is executed opposite a counterparty for which the transaction would qualify as a bona fide hedging position and for which the risk is offset with a referenced contract, showing:

(A) The underlying commodity or commodity reference price;

(B) The applicable clearing identifiers;

(C) The notional quantity;

(D) The gross long or short position in terms of futures-equivalents in the core referenced futures contract; and

(E) The gross long or short positions in the referenced contract for the offsetting risk position; and

(ii) *Spot-month swap offset.* For each cash-settled swap executed opposite a counterparty for which the transaction would qualify as a bona fide hedging position and for which the risk is offset with a physical-delivery referenced contract held into a spot month, showing for such cash-settled swap that is not a referenced contract the information required under paragraph (a)(2)(i) of this section and for such cash-settled swap that is a referenced contract:

(A) The gross long or short position for such cash-settled swap in terms of futures-equivalents in the core referenced futures contract; and

(B) The gross long or short positions in the physical-delivery referenced contract for the offsetting risk position.

(3) *Other exemptions.* Persons required to file '04 reports under § 19.00(a)(1)(iii) shall file CFTC Form 204 reports showing the composition of the cash position of each commodity hedged or underlying a reportable position including:

(i) The as of date, an indication of any enumerated bona fide hedging position exemption(s) claimed, the commodity derivative contract held or controlled, and the equivalent core reference futures contract;

(ii) The quantity of stocks owned of such commodities and their products and byproducts;

(iii) The quantity of fixed-price purchase commitments open in such cash commodities and their products and byproducts;

(iv) The quantity of fixed-price sale commitments open in such cash commodities and their products and byproducts;

(v) The quantity of unfixed-price purchase and sale commitments open in such cash commodities and their products and byproducts, in the case of offsetting unfixed-price cash commodity sales and purchases; and

(vi) For cotton, additional information that includes:

(A) The quantity of equity in cotton held by the Commodity Credit Corporation under the provisions of the Upland Cotton Program of the Agricultural Stabilization and Conservation Service of the U.S. Department of Agriculture;

(B) The quantity of certificated cotton owned; and

(C) The quantity of non-certificated stocks owned.

(4) *Anticipatory exemptions.* Persons required to file '04 reports under § 19.00(a)(1)(iv) shall file:

(i) CFTC Form 704 for the initial statement pursuant to § 150.7(d) of this chapter, the supplemental statement pursuant to § 150.7(e) of this chapter, and the annual update pursuant to § 150.7(f) of this chapter; and

(ii) CFTC Form 204 monthly on the remaining unsold, unfilled and other anticipated activity for the Specified Period that was reported on such person's most recently filed Form 704, Section A pursuant to § 150.7(g) of this chapter.

(b) *Time and place of filing reports.*—(1) *General.* Except for reports filed in response to special calls made under § 19.00(a)(3) or reports required under § 19.00(a)(1)(i), (a)(1)(ii)(B), or § 19.01(a)(4)(i), each report shall be made monthly:

(i) As of the close of business on the last Friday of the month, and

(ii) As specified in paragraph (b)(3) of this section, and not later than 9 a.m. Eastern Time on the third business day following the date of the report.

(2) *Conditional spot month limit.* Persons required to file '04 reports under § 19.00(a)(1)(i) shall file each report for special commodities as specified by the Commission under § 19.03:

(i) As of the close of business for each day the person exceeds the limit during a spot period up to and through the day the person's position first falls below the position limit; and

(ii) As specified in paragraph (b)(3) of this section, and not later than 9 a.m. Eastern Time on the next business day following the date of the report.

(3) *Electronic filing.* CFTC '04 reports must be transmitted using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission.

§ 19.02 Reports pertaining to cotton on call purchases and sales.

(a) *Information required.* Persons required to file '04 reports under § 19.00(a)(2) shall file CFTC Form 304 reports showing the quantity of call cotton bought or sold on which the price has not been fixed, together with the respective futures on which the purchase or sale is based. As used herein, call cotton refers to spot cotton bought or sold, or contracted for purchase or sale at a price to be fixed later based upon a specified future.

(b) *Time and place of filing reports.* Each report shall be made weekly as of the close of business on Friday and filed using the procedure under § 19.01(b)(3), not later than 9 a.m. Eastern Time on the third business day following the date of the report.

§ 19.03 Reports pertaining to special commodities.

From time to time to facilitate surveillance in certain commodity derivative contracts, the Commission may designate a commodity derivative contract for reporting under § 19.00(a)(1)(i) and will publish such determination in the **Federal Register** and on its Web site. Persons holding or controlling positions in such special commodity derivative contracts must, beginning 30 days after notice is published in the **Federal Register**, comply with the reporting requirements under § 19.00(a)(1)(i) and file Form 504 for conditional spot month limit exemptions.

§ 19.04 Delegation of authority to the Director of the Division of Market Oversight.

(a) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority in § 19.01 to provide instructions or to determine the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under this part.

(b) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(c) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

§§ 19.05–19.10 [Reserved]

Appendix A to Part 19—Forms 204, 304, 504, 604, and 704

Note: This Appendix includes representations of the proposed reporting forms, which would be submitted in an electronic format published pursuant to the proposed rules, either via the Commission's web portal or via XML-based, secure FTP transmission.

BILLING CODE 6351–01–P

CFTC FORM 204
Statement of Cash Positions of Hedgers

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act")[848] and the regulations thereunder,[849] or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of section 6(c)(2) of the Act (7 U.S.C. 9), section 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or section 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

PRIVACY ACT NOTICE

The Commission's authority for soliciting this information is granted in sections 4a, 4c(b), 4i, 4t and 8a(5) of the CEA and related regulations (see, e.g., 17 CFR 19.00). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (*see, e.g.*, 7 U.S.C. sections 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is most commonly used in the Commission's market and trade practice surveillance activities to (a) provide information concerning the size and composition of the commodity derivatives markets, (b) permit the Commission to monitor and enforce speculative position limits and (c) enhance the Commission's trade surveillance data. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies and to contract markets to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on www.cftc.gov.

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[848] 7 U.S.C. section 1, et seq.

[849] Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter 1 of title 17 of the Code of Federal Regulations; 17 CFR Chapter 1 et seq.

BACKGROUND & INSTRUCTIONS

17 CFR 19.00(a) requires each person subject to the provisions of this paragraph to report its cash positions to the Commission by filing series '04 reports. 17 CFR 19.00(b) specifies the manner of reporting on Form '04 series. 17 CFR 19.01(a)(3) and (a)(4)(ii) specifies the information required on Form 204. 17 CFR 19.01(b)(1) specifies the frequency (**monthly**), the as of report date (close of business on the last Friday of the month), and the time (9 a.m. Eastern Time on the third business day following the date of the report) for filing the reports. As appropriate, please follow the instructions below to generate and submit the required report or filing. Unless the context requires otherwise, the terms used herein shall have the same meaning as ascribed in parts 15 to 21 of the Commission's regulations.

Complete Form 204 as follows:

General & Identifying Information:	All filers.
Section A:	Complete for stock and fixed-price cash positions
Date	As of date for reported position
BFH Claimed	Applicable § 150.1 Definitions BFH position, paragraph (e.g. – (2) Hedge of a physical commodity and (3)(iv) Hedges by Agents, and (5), if cross-hedged)
CDC or RC	CDC or RC, as defined in § 150.1 - used for hedging
CRFC	Corresponding Core Referenced Futures Contract
Futures Equivalent in CRFC	Futures Equivalent in CRFC selected from § 150.2(d)
Cash commodity hedged	Cash commodity hedged by the CDC positions
Units	Units of measure for cash commodity being hedged
Stock	Stocks per § 19.01(a)(3)(ii)
Purchase commitments	Fixed-price purchases pursuant to § 19.01(a)(3)(iii)
Sale commitments	Fixed-price sales pursuant to § 19.01(a)(3)(iv)
Remaining Anticipated Activity	Remaining Unsold, Unfilled and Other Anticipated Activity for the Specified Period in Form 704, Section A, pursuant to § 150.7(g) and § 19.01(a)(4)(ii)
Section B:	Complete for Unfixed-price cash purchases and sales
Date	As of date for reported position
BFH Claimed	Applicable § 150.1 Definitions BFH position, paragraph (e.g. – (2) Hedge of a physical commodity and (3)(iv) Hedges by Agents, and (5), if cross-hedged)
CDC or RC, and corr. CRFC	CDC or RC, as defined in § 150.1 - used for hedging
Futures Equivalent in CRFC	Futures Equivalent in CRFC selected from § 150.2(d)
Cash commodity hedged	Cash commodity hedged by the CDC positions
Units	Units of measure for cash commodity being hedged
Unfixed-price purchases	Unfixed-price purchases per § 19.01(a)(3)(v)
Unfixed-price sales	Unfixed-price sales per § 19.01(a)(3)(v)
Section C:	Complete for cotton, in addition to the above
Stocks	Report positions separately for equity stocks, certificated stocks and non-certificated stocks per § 19.01(a)(3)(vi).
Signature/Authentication:	All filers.

Submitting Form 204: Once completed, please submit this form to the Commission pursuant to the instructions on [www.cftc.gov] or as otherwise directed by Commission staff. If submission attempts fail, the reporting trader shall contact the Commission at [techsupport@cftc.gov] for further technical support.

Please be advised that pursuant to 5 CFR 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

COMMODITY FUTURES TRADING COMMISSION
FORM 204 - STATEMENT OF CASH POSITIONS OF HEDGERS

CFTC CODE NO. [INSERT]			OMB No. XXXX-XXXX
Identifying Information			
Identification Codes			
NFA ID	Legal Entity Identifier (LEI)		Other CFTC Identifier
Name of Non-Natural Person			
Name of Natural Person			
First Name	Middle Name	Last Name	Suffix
Contact Information			
Address	Phone Number	Email Address	

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") and the regulations thereunder, or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both. Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

A. Cash positions pursuant to the following paragraphs of § 19.01(a)(3)(i), (ii), (iii), (iv), and (4)(ii).

Date	Bona Fide Hedge Indication (BFHI) – Cite specific BFH definition in § 150.1 or other applicable §	Commodity Derivative Contract (CDC) or Referenced Contract (RC) used for Hedging	Core Referenced Futures Contract (CRFC)	Futures Equivalent in Core Reference Futures Contract (CRFC)	Cash Commodity Hedged	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Stocks Owned	Fixed-Price Purchases	Fixed-Price Sales	Remaining Unsold, Unfilled and Other Anticipated Activity for the Specified Period in Form 704, Section A

B. Offsetting Unfixed-Price Purchases and Sales pursuant to § 19.01(a)(3)(v).

Date	Bona Fide Hedge Indication (BFHI) – Cite specific BFH definition in § 150.1 or other applicable §	Commodity Derivative Contract (CDC) or Referenced Contract (RC) used for Hedging	Core Referenced Futures Contract (CRFC)	Futures Equivalent in Core Reference Futures Contract (CRFC)	Cash Commodity Hedged	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Unfixed-Price Purchases	Unfixed-Price Sales

C. Cotton Stocks owned in Section A above pursuant to § 19.01(a)(3)(vi). Report in hundreds of bales (500-lb. bales).

Equity Stock ('00 bales)	Certificated Stocks ('00 bales)	Non-certificated Stocks ('00 bales)

Please sign/authenticate the Form 204 prior to submitting.

Signature/ Electronic Authentication:

□ By checking this box and submitting this form (or by clicking "submit," "send," or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting trader identified below to provide the information and representations submitted on this Form 204, and that the information and representations are true and correct.

Reporting Trader Authorized Representative (Name and Position):

____________________ (Name)

____________________ (Position)

Submitted on behalf of:

____________________ (Reporting Trader Name)

Date of Submission:

____

Form 204, Example A- A commercial entity has inventory of 10,000,000 barrels of crude oil, no fixed-price sales contracts, and 20,000,000 barrels of crude oil in fixed-price purchase contracts. The commercial entity claims a bona fide hedging exemption for a short position of 30,000 contracts in the NYMEX light sweet crude oil futures contract, equivalent to 30,000,000 barrels of crude oil. The commercial entity has other short speculative positions in the futures contract that, absent the bona fide hedging exemption, would cause it to exceed the speculative position limit.

A. Cash positions pursuant to the following paragraphs of § 19.01 (a) (3) (i), (ii), (iii), (iv), and (4)(ii).										
Date	Bona Fide Hedge Indication (BFHI) – Cite specific BFH definition in § 150.1 or other applicable §	Commodity Derivative Contract (CDC) or Referenced Contract (RC) used for Hedging	Core Referenced Futures Contract (CRFC)	Futures Equivalent in Core Reference Futures Contract (CRFC) - = short	Cash Commodity Hedged	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Stocks Owned	Fixed-Price Purchases	Fixed-Price Sales	Remaining Unsold, Unfilled and Other Anticipated Activity for the Specified Period in Form 704, Section A
5/6/2013	§150.1 BFH (3)(iii)	CL-NYMEX	CL-NYMEX	-30,000	Crude oil	Bbls	10,000,000	20,000,000	0	0

Form 204, Example B- A commercial entity has filed unfilled anticipated requirements in an initial statement on form 704, Section A, in the amount of 120,000,000 MMBtu of natural gas. The current remaining unfilled anticipated requirements are 70,000,000 MMBtu. The person owns stocks of 20,000,000 MMBtu and has entered into fixed-price purchases of 30,000,000 MMBtu. The combined long cash position is long 50,000,000 MMBtu. The total position being hedged, i.e., the remaining unfilled anticipatory requirements of 70,000,000 MMBtu and the long cash position of 50,000,000 MMBtu, equals a long position of 120,000,000 MMBtu in the cash commodity. The commercial entity reports a futures equivalent short position of 10,000 contracts in the CRFC as a hedge, equivalent to short 100,000,000 MMBtu, which is less than the combined long cash position and the remaining unfilled anticipated requirements. Hence, the cash position is partially hedged.

A. Cash positions pursuant to the following paragraphs of § 19.01 (a) (3) (i), (ii), (iii), (iv), and (4)(ii).										
Date	Bona Fide Hedge Indication (BFHI) – Cite specific BFH definition in § 150.1 or other applicable §	Commodity Derivative Contract (CDC) or Referenced Contract (RC) used for Hedging	Core Referenced Futures Contract (CRFC)	Futures Equivalent in Core Reference Futures Contract (CRFC) - = short	Cash Commodity Hedged	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Stocks Owned	Fixed-Price Purchases	Fixed-Price Sales	Remaining Unsold, Unfilled and Other Anticipated Activity for the Specified Period in Form 704, Section A
5/6/2013	§150.1 BFH (3)(ii) §150.1 BFH (3)(iii)	HH-NYMEX	NG-NYMEX	-10,000	Natural gas	MMBtu	20,000,000	30,000,000	0	70,000,000

Form 204, Example C- A commercial entity has entered into offsetting unfixed-price purchase and sale contracts in the amount of 25,000,000 MMBtu of natural gas. The hedging position is a futures equivalent long position of 10,000 contracts and a futures equivalent short position of 10,000 contracts.

B. Offsetting Unfixed-Price Purchases and Sales pursuant to § 19.01(a)(3) (v).								
Date	Bona Fide Hedge Indication (BFHI) – Cite specific BFH definition in § 150.1 or other applicable §	Commodity Derivative Contract (CDC) or Referenced Contract (RC) used for Hedging	Core Referenced Futures Contract (CRFC)	Futures Equivalent in Core Reference Futures Contract (CRFC)	Cash Commodity Hedged	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Unfixed-Price Purchases	Unfixed-Price Sales
5/6/2013	§150.1 BFH (3)(ii)	HH-NYMEX	NG-NYMEX	10,000	Natural Gas	MMBtu	25,000,000	25,000,000
	continuation	HH-NYMEX	NG-NYMEX	-10,000	Natural Gas	MMBtu		

Form 204, Example D– A merchant reportable in cotton futures has the following inventory: no equity stock, 100 bales of certificated stock, and 500 bales of non-certificated stock.

C. Cotton Stocks owned in Section A above pursuant to § 19.01(a)(3)(vi). Report in hundreds of bales (500-lb. bales).		
Equity Stock ('00 bales)	Certificated Stocks ('00 bales)	Non-certificated Stocks ('00 bales)
0	1	5

CFTC FORM 304
Statement of Cash Positions for Unfixed-Price Cotton "On Call"

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") [1] and the regulations thereunder,[2] or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of section 6(c)(2) of the Act (7 U.S.C. 9), section 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or section 1001 of Title 18, Crimes and Criminal Procedure (18 USC 1001) and (b) result in punishment by fine or imprisonment, or both.

PRIVACY ACT NOTICE

The Commission's authority for soliciting this information is granted in sections 4i and 8 of the CEA and related regulations (see, e.g., 17 CFR 19.02). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (*see*, e.g., 7 U.S.C. 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is most commonly used in the Commission's market and trade practice surveillance activities to (a) provide information concerning the size and composition of the commodity derivatives markets, (b) permit the Commission to monitor and enforce speculative position limits and (c) enhance the Commission's trade surveillance data. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies and to contract markets to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on www.cftc.gov.

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[1] 7 U.S.C. section 1, et seq.
[2] Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter 1 of title 17 of the Code of Federal Regulations; 17 CFR Chapter 1 et seq.

BACKGROUND & INSTRUCTIONS

17 CFR 19.00(a) requires each person subject to the provisions of this paragraph to report its cash positions to the Commission by filing series ’04 reports. 17 CFR 19.00(b) specifies the manner of reporting on Form ’04 series. 17 CFR 19.02(a) specifies the information required on Form 304. 17 CFR 19.02(b) specifies the frequency (**weekly**), the as of report date (close of business Friday,) and the time (9 a.m. Eastern Time on the third business day following the report date) for filing the reports. As appropriate, please follow the instructions below to generate and submit the required report or filing. Unless the context requires otherwise, the terms used herein shall have the same meaning as ascribed in parts 15 to 21 of the Commission’s regulations.

Complete Form 304 as follows:

General & Identifying Information:	All filers.
For each listed stock, report	Delivery month Delivery year Call purchases Call sales
Signature/Authentication:	All filers.

Submitting Form 304: Once completed, please submit this form to the Commission pursuant to the instructions on [www.cftc.gov] or as otherwise directed by Commission staff. If submission attempts fail, the reporting trader shall contact the Commission at [techsupport@cftc.gov] for further technical support.

Please be advised that pursuant to 5 CFR 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

COMMODITY FUTURES TRADING COMMISSION
FORM 304 - STATEMENT OF CASH POSITIONS FOR UNFIXED-PRICE COTTON "ON-CALL"

CFTC CODE NO. [INSERT]			OMB No. XXXX-XXXX
Identifying Information			
Identification Codes			
NFA ID	Legal Entity Identifier (LEI)		Other CFTC Identifier
Name of Non-Natural Person			
Name of Natural Person			
First Name	Middle Name	Last Name	Suffix
Contact Information			
Address	Phone Number	Email Address	

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") and the regulations thereunder, or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both. Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Unfixed-price Cotton "on-call" pursuant to § 19.02(a); include under "Call Purchases" stocks on hand for which price has not yet been fixed. Report in hundreds of bales (500-lb. bales).

Delivery Month	Delivery Year	Call Purchases ('00 bales)	Call Sales ('00 bales)

Please sign/authenticate the Form 304 prior to submitting.

Signature/ Electronic Authentication:

□ By checking this box and submitting this form (or by clicking "submit," "send," or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting trader identified below to provide the information and representations submitted on this Form 304, and that the information and representations are true and correct.

Reporting Trader Authorized Representative (Name and Position):

____________________ (Name)

____________________ (Position)

Submitted on behalf of:

____________________ (Reporting Trader Name)

Date of Submission:

____

Form 304, Example – July 2013 Call purchases of 200 bales and sales of 1,800 bales; October Call purchases of 6,600 bales and sales of 8,000 bales.

Unfixed-price Cotton "on-call" pursuant to § 19.02(a); include under "Call Purchases" stocks on hand for which price has not yet been fixed. Report in hundreds of bales (500-lb. bales).

Delivery Month	Delivery Year	Call Purchases ('00 bales)	Call Sales ('00 bales)
July	2013	2	18
October	2013	66	80

CFTC FORM 504

Statement of Cash Positions for Conditional Spot Month Exemptions

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act")[1] and the regulations thereunder,[2] or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of section 6(c)(2) of the Act (7 U.S.C. 9), section 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or section 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

PRIVACY ACT NOTICE

The Commission's authority for soliciting this information is granted in sections 4a, 4c(b), 4i, 4t and 8a(5) of the CEA and related regulations (see, e.g., 17 CFR 19.00). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (see, e.g., 7 U.S.C. 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is most commonly used in the Commission's market and trade practice surveillance activities to (a) provide information concerning the size and composition of the commodity derivatives markets, (b) permit the Commission to monitor and enforce speculative position limits and (c) enhance the Commission's trade surveillance data. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies and to contract markets to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on www.cftc.gov.

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[1] 7 U.S.C. section 1, et seq.

[2] Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter 1 of title 17 of the Code of Federal Regulations; 17 CFR Chapter 1 et seq.

BACKGROUND & INSTRUCTIONS

17 CFR 19.00(a) requires each person subject to the provisions of this paragraph to report its cash positions to the Commission by filing series ’04 reports. 17 CFR 19.00(b) specifies the manner of reporting on Form ’04 series. 17 CFR 19.01 (a) (1) specifies the information required on Form 504. 17 CFR 19.01 (b) (2) specifies the frequency (**each day during the spot month**), the as of report date (close of business for each day during the spot month), and the time (9 a.m. Eastern Time on the next business day) for filing the Form 504 spot month reports. As appropriate, please follow the instructions below to generate and submit the required report or filing. Unless the context requires otherwise, the terms used herein shall have the same meaning as ascribed in parts 15 to 21 of the Commission’s regulations.

Complete Form 504 as follows:

General & Identifying Information:	All filers.
Data:	Complete for stock and fixed-price cash positions
Date	As of date for reported position -§ 19.01(a)(1)(i)
CRFC	Core Referenced Futures Contract from § 150.2(d)
Cash commodity	Cash commodity identification
Units	Units of measure for cash commodity
Stocks	Deliverable stored commodity - § 19.01(a)(1)(ii)
Fixed-price Purchase	Fixed-price purchase commitments - § 19.01(a)(1)(iii)
Fixed-price Sale	Fixed-price sale commitments - § 19.01(a)(1)(iv)
Unfixed-price Purchase	Unfixed-price purchase commitments - § 19.01(a)(1)(v)
Unfixed-price Sale	Unfixed-price sale commitments - § 19.01(a)(1)(vi)
Signature/Authentication:	All filers.

Submitting Form 504: Once completed, please submit this form to the Commission pursuant to the instructions on [www.cftc.gov] or as otherwise directed by Commission staff. If submission attempts fail, the reporting trader shall contact the Commission at [techsupport@cftc.gov] for further technical support.

Please be advised that pursuant to 5 CFR 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

COMMODITY FUTURES TRADING COMMISSION FORM 504 - STATEMENT OF CASH POSITIONS OF SPOT-MONTH HEDGE EXEMPTIONS

CFTC CODE NO. [INSERT]			OMB No. XXXX-XXXX
Identifying Information			
Identification Codes			
NFA ID	Legal Entity Identifier (LEI)		Other CFTC Identifier
Name of Non-Natural Person			
Name of Natural Person			
First Name	Middle Name	Last Name	Suffix
Contact Information			
Address	Phone Number	Email Address	

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") and the regulations thereunder, or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both. Please be advised that pursuant to 5 CFR 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

Cash positions pursuant to § 19.01(a)(1).

Date	Core Reference Futures Contract (CRFC)	Cash Commodity	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Deliverable Cash Commodity held in Stock or Storage	Fixed-price Cash Purchase Commitment	Fixed-price Cash Sale Commitment	Unfixed-price Cash Purchase Commitment	Unfixed-price Cash Sale Commitment

Please sign/authenticate the Form 504 prior to submitting.

Signature/ Electronic Authentication:

□ By checking this box and submitting this form (or by clicking "submit," "send," or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting trader identified below to provide the information and representations submitted on this Form 504, and that the information and representations are true and correct.

Reporting Trader Authorized Representative (Name and Position):

____________________ (Name)

____________________ (Position)

Submitted on behalf of:

____________________ (Reporting Trader Name)

Date of Submission:

____

Form 504 Example. The spot month for the physical-delivery May 2013 NYMEX Henry Hub Natural Gas (NG) futures contract (the CRFC for natural gas) was from the close of business on April 23 through 5:15 p.m. on the last day of trading, April 26, 2013.[1]
A trader held positions in cash-settled natural gas referenced contracts settling on April 25, 2013, that were in excess of the spot month limit (1,000 contracts), but that did not exceed five times the spot month limit (5,000 contracts), on each of April 23, 24, and 25, 2013. That trader did not hold any cash-settled referenced contracts settling on April 26, 2013; however, pursuant to § 19.01(b)(2)(i), a person must also report cash positions through the day the person's position first falls below the position limit. Consistent with claiming the conditional spot month limit exemption, the person held no position in the May 2013 NYMEX NG contract during the spot month. Each line of the report represents each day of this conditional spot month limit exemption.

The person's purchase and sales commitments have the same delivery period as that of the May 2013 NYMEX NG contract.[2] As of the close of business on April 23, 2013, the person held: natural gas inventory of 10,000,000 MMBtus; fixed-price purchase contracts of 5,000,000 MMBtus; fixed price sales contracts of 10,000,000 MMBtu; unfixed-price cash purchase contracts of 5,000,000 MMBtu; and unfixed-price cash sales contracts of 5,000,000 MMBtu. The contract prices for each of the unfixed-price sales contracts and the unfixed-price purchase contracts were to become fixed 20 percent per business day on April 24, 25, 26, 29 and 30, 2013. The trader did not execute any cash transactions during the spot month.

Cash positions pursuant to § 19.01(a)(1).								
Date	Core Reference Futures Contract (CRFC)	Cash Commodity	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Deliverable Cash Commodity held in Stock or Storage	Fixed-price Cash Purchase Commitment	Fixed-price Cash Sale Commitment	Unfixed-price Cash Purchase Commitment	Unfixed-price Cash Sale Commitment

[1] April 23, 2013, was the last trading day of the expiring NYMEX NG contract and 5:15 p.m. on that last trading day was the latest time permitted to transfer an open position, via an exchange of futures for risk position (EFRP) transaction. The NYMEX NG contract unit of trading is 10,000 MMBtu.

[2] The delivery period for the May 2013 NYMEX NG contract was the month of May 2013, with contract terms requiring natural gas to be delivered at as uniform an hourly and daily rate of flow over the course of the delivery month as is possible. Cash commodity inventory and purchase and sales contract quantities are expressed in one million British thermal units (MMBtu).

Cash positions pursuant to § 19.01(a)(1).								
4/23/2013	NG-NYMEX	Natural Gas in U.S.	MMBtu	10,000,000	5,000,000	10,000,000	5,000,000	5,000,000
4/24/2013	NG -NYMEX	Natural Gas in U.S.	MMBtu	10,000,000	6,000,000	11,000,000	4,000,000	4,000,000
4/25/2013	NG-NYMEX	Natural Gas in U.S.	MMBtu	10,000,000	7,000,000	12,000,000	3,000,000	3,000,000
4/26/2013	NG-NYMEX	Natural Gas in U.S.	MMBtu	10,000,000	8,000,000	13,000,000	2,000,000	2,000,000

CFTC FORM 604

Statement of Pass-Through Swap Exemptions

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act")[1] and the regulations thereunder,[2] or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of section 6(c)(2) of the Act (7 USC 9), section 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or section 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

PRIVACY ACT NOTICE

The Commission's authority for soliciting this information is granted in sections 4a, 4c(b), 4i, 4t and 8a(5) of the CEA and related regulations (*see*, e.g., 17 CFR 19.00). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (see, e.g., 7 U.S.C. 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is most commonly used in the Commission's market and trade practice surveillance activities to (a) provide information concerning the size and composition of the commodity derivatives markets, (b) permit the Commission to monitor and enforce speculative position limits and (c) enhance the Commission's trade surveillance data. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies and to contract markets to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on www.cftc.gov.

[1] 7 U.S.C. section 1, et seq.

[2] Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter 1 of title 17 of the Code of Federal Regulations; 17 CFR Chapter 1 et seq.

BACKGROUND & INSTRUCTIONS

17 CFR 19.00(a) requires each person subject to the provisions of this paragraph to report its cash positions to the Commission by filing series '04 reports. 17 CFR 19.00(b) specifies the manner of reporting on Form '04 series. 17 CFR § 19.01(a)(3) specifies the information required on Form 604. 17 CFR 19.01 (b) (1) specifies the frequency (**monthly**), the as of report date (close of business on the last Friday of the month), and the time (9 a.m. Eastern Time on the third business day following the date of the report) for filing the reports pursuant to § 19.00(a)(1)(ii)(A) for pass-through swaps with non-referenced-contract swap offset. CFR § 19.01(b)(2) specifies the frequency (**each day during the spot month**), the as of report date (close of business for each day during the spot month), and the time (9 a.m. Eastern Time on the next business day) for filing the Form 604 spot-month swap offset reports pursuant to § 19.00(a)(1)(ii)(B) for pass-through swaps with spot-month swap offset. As appropriate, please follow the instructions below to generate and submit the required report or filing. Unless the context requires otherwise, the terms used herein shall have the same meaning as ascribed in parts 15 to 21 of the Commission's regulations.

Complete Form 604 as follows:

General & Identifying Information:	All filers.
Section A:	Complete for Non-referenced contract swap offset
Date	As of date for reported position
Non-referenced contract	Underlying Commodity or Commodity Reference Price that is not a Referenced Contract (RC) - § 19.01(a)(2)(i)(A)
CRFC	Corresponding Core Referenced Futures Contract
Applicable Clearing Identifier	§ 19.01(a)(2)(i)(B)
Commodity Quantity Unit – CQU	Unit of Measurement for Commodity
Notional Quantity	§ 19.01(a)(2)(i)(C) in CQU
Position in FE in CRFC	§ 19.01(a)(2)(i)(D), gross long or short positions
Position in RC for offsetting risk	§ 19.01(a)(2)(i)(E), gross long or short positions
Section B:	Complete for Spot-month swap offset
Date	As of date for reported position
Non-referenced contract	Underlying Commodity or Commodity Reference Price that is not a Referenced Contract (RC) - § 19.01(a)(2)(i)(A)
Applicable Clearing Identifier	§ 19.01(a)(2)(i)(B)
Commodity Quantity Unit – CQU	Unit of Measurement for Commodity
Notional Quantity	§ 19.01(a)(2)(i)(C)
Position in FE for cash-settled swaps	§ 19.01(a)(2)(ii)(A), gross long or short positions
Position in p-d RC for offsetting risk	§ 19.01(a)(2)(ii)(B), gross long or short positions in physical-delivery (p-d) referenced contracts (RC)
Signature/Authentication:	All filers.

Submitting Form 604: Once completed, please submit this form to the Commission pursuant to the instructions on [www.cftc.gov] or as otherwise directed by Commission staff. If submission attempts fail, the reporting trader shall contact the Commission at [techsupport@cftc.gov] for further technical support.

Please be advised that pursuant to 5 CFR 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

COMMODITY FUTURES TRADING COMMISSION
FORM 604 - STATEMENT OF PASS-THROUGH SWAP EXEMPTIONS

CFTC CODE NO. [INSERT]			OMB No. XXXX-XXXX
Identifying Information			
Identification Codes			
NFA ID	Legal Entity Identifier (LEI)		Other CFTC Identifier
Name of Non-Natural Person			
Name of Natural Person			
First Name	Middle Name	Last Name	Suffix
Contact Information			
Address	Phone Number	Email Address	

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") and the regulations thereunder, or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both. Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

A. Non-referenced contract swap offset pursuant to § 19.01(a)(2)(i), reported and submitted **monthly** pursuant to § 19.01(b)(1)

Date	Underlying Commodity or Commodity Reference Price that is not a Referenced Contract (RC)	Core Referenced Futures contract (CRFC)	Applicable Clearing Identifier	Commodity Quantity Units of Measurement (Specify Tons, Lbs., Bu., Bbls., etc.)	Notional Quantity in CQU	Gross Long Position in Futures Equivalent in the CRFC	Gross Short Position in Futures Equivalent in the CFRC	Gross Long Position in the RC for the Offsetting Risk Position in CQU	Gross Short Position in the RC for the Offsetting Risk Position in CQU

B. Spot-month swap offset pursuant to § 19.01(a)(2)(ii), reported and submitted **daily** pursuant to § 19.01(b)(2) for non-referenced and referenced cash-settled swaps									
Date	Non-referenced or referenced contract for cash-settled swap offsetting BFH exemption of counterparty	Core Referenced Futures contract (CRFC)	Applicable Clearing identifier	Commodity Quantity Units of Measurement (Specify Tons, Lbs., Bu., Bbls., etc.) - CQU	Notional Quantity in CQU	Gross Long Position for Cash-settled Swap in Futures Equivalent in the CRFC	Gross Short Position for Cash-settled Swap in Futures Equivalent in the CFRC	Gross Long Position in the Physical-delivery RC for the Offsetting Risk Position in CQU	Gross Short Position in the Physical-delivery RC for the Offsetting Risk Position in CQU

Please sign/authenticate the Form 604 prior to submitting.

Signature/ Electronic Authentication:

□ By checking this box and submitting this form (or by clicking “submit,” “send,” or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting trader identified below to provide the information and representations submitted on this Form 604, and that the information and representations are true and correct.

Reporting Trader Authorized Representative (Name and Position):

____________________ (Name)

____________________ (Position)

Submitted on behalf of:

____________________ (Reporting Trader Name)

Date of Submission:

____

Form 604, Example A. A person offsets a long position in a cash-settled milo swap with a notional size of 5,000,000 bushels, using the CBOT Corn futures contract, as a cross-commodity hedge. The milo swap was a bona fide hedging position for the swap counterparty, and was not cleared. For illustrative purposes, the hedge ratio is assumed to be one-to-one between milo and corn.

A. Non-referenced contract swap offset pursuant to § 19.01(a)(2)(i), reported and submitted **monthly** pursuant to § 19.01(b)(1)									
Date	Underlying Commodity or Commodity Reference Price that is not a Referenced Contract (RC)	Core Referenced Futures contract (CRFC)	Applicable Clearing Identifier	Commodity Quantity Units of Measurement (Specify Tons, Lbs., Bu., Bbls., etc.)	Notional Quantity in CQU	Gross Long Position in Futures Equivalent in the CRFC	Gross Short Position in Futures Equivalent in the CFRC	Gross Long Position in the RC for the Offsetting Risk Position in CQU	Gross Short Position in the RC for the Offsetting Risk Position in CQU
6/28/2013	Milo	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000

Form 604, Example B. A person offsets a cash-settled corn swap with a notional size of 5,000,000 bushels, using the CBOT Corn futures contract during the spot month. An exemption for swap offsets is not permitted in the physical-delivery CBOT Corn futures contract in the last five days of trading. For the May 2013 CBOT Corn futures contract, the last day of trading is May 14 (CBOT rules specify the last trading day as the business day preceding the fifteenth calendar day of the contract month). Hence, the spot month swap offset exemption is not available in the May 2013 CBOT Corn futures contract as of the close of business on May 7, 2013. At that time, the trader must comply with the 600 contract spot month limit, equivalent to 3,000,000 bushels of corn, absent another exemption. Each line represents each day's report for this swap offset position. The spot month for the CBOT Corn futures contract begins at the close of trading two business days prior to the first trading day of the delivery month; hence, April 29, 2013, was the start of the spot month for the May 2013 CBOT Corn futures contract. The corn swap was a bona fide hedging position for the swap counterparty, and was not cleared.

B. Spot-month swap offset pursuant to § 19.01(a)(2)(ii), reported and submitted **daily** pursuant to § 19.01(b)(2) for non-referenced and referenced cash-settled swaps

Date	Non-referenced or referenced contract for cash-settled swap offsetting BFH exemption of counterparty	Core Referenced Futures contract (CRFC)	Applicable Clearing Identifier	Commodity Quantity Units of Measurement (Specify Tons, Lbs., Bu., Bbls., etc.) - CQU	Notional Quantity in CQU	Gross Long Position for Cash-settled Swap in Futures Equivalent in the CRFC	Gross Short Position for Cash-settled Swap in Futures Equivalent in the CFRC	Gross Long Position in the Physical-delivery RC for the Offsetting Risk Position in CQU	Gross Short Position in the Physical-delivery RC for the Offsetting Risk Position in CQU
4/29/2013	Corn swap	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000
5/30/2013	Corn swap	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000
5/01/2013	Corn swap	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000
5/02/2013	Corn swap	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000
5/03/2013	Corn swap	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000
5/06/2013	Corn swap	C-CBOT	NA	Bu	5,000,000	1,000	0	0	5,000,000
5/07/2013	Corn swap	C-CBOT	NA	Bushels-Bu	5,000,000	1,000	0	0	3,000,000

CFTC FORM 704
Statement of Anticipatory Bona Fide Hedge Exemptions

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act")[1] and the regulations thereunder,[2] or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of section 6(c)(2) of the Act (7 USC 9), section 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or section 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both.

PRIVACY ACT NOTICE

The Commission's authority for soliciting this information is granted in sections 4a, 4c(b), 4i, 4t and 8a(5) of the CEA and related regulations (see, e.g., 17 CFR 19.00). The information solicited from entities and individuals engaged in activities covered by the CEA is required to be provided to the CFTC, and failure to comply may result in the imposition of criminal or administrative sanctions (*see*, e.g., 7 U.S.C. 9 and 13a-1, and/or 18 U.S.C. 1001). The information requested is most commonly used in the Commission's market and trade practice surveillance activities to (a) provide information concerning the size and composition of the commodity derivatives markets, (b) permit the Commission to monitor and enforce speculative position limits and (c) enhance the Commission's trade surveillance data. The requested information may be used by the Commission in the conduct of investigations and litigation and, in limited circumstances, may be made public in accordance with provisions of the CEA and other applicable laws. It may also be disclosed to other government agencies and to contract markets to meet responsibilities assigned to them by law. The information will be maintained in, and any additional disclosures will be made in accordance with, the CFTC System of Records Notices, available on www.cftc.gov.

[1] 7 U.S.C. section 1, et seq.
[2] Unless otherwise noted, the rules and regulations referenced in this notice are found in chapter 1 of title 17 of the Code of Federal Regulations; 17 CFR Chapter 1 et seq.

BACKGROUND & INSTRUCTIONS

17 CFR 19.00(a) requires each person subject to the provisions of this paragraph to report its cash positions to the Commission by filing series '04 reports. 17 CFR 19.00(b) specifies the manner of reporting on Form '04 series. 17 CFR 19.01(a)(4) specifies the information required on Form 704. 17 CFR § 150.7 specifies that a person shall file Form 704 with the Commission at least ten days in advance of the date such exemption is needed. As appropriate, please follow the instructions below to generate and submit the required report or filing. Unless the context requires otherwise, the terms used herein shall have the same meaning as ascribed in parts 15 to 21 of the Commission's regulations.

Complete Form 704 as follows:

General & Identifying Information:	All filers.
Section A:	Initial anticipatory, § 150.7 (d), and supplemental, § 150.7 (e) for change from initial anticipatory
Anticipated Activity	§ 150.1 BFH definition (3)(iii), (4)(i),(4)(iii), (4)(iv), or (5)
Cash Commodity	§ 150.7 (d)(1)(i)
Units	Units of measure for cash commodity being hedged
CRFC	Corresponding Core Referenced Futures Contract
Cash commodity and CRFC	§ 150.7 (d)(1)(iii) and § 150.2 (d) Table of CRFCs
Annual Activity last three years	§ 150.7 (d)(1)(iv)
Specific Time Period Claimed	§ 150.7 (d)(1)(v)
Anticipated for Specified Time	§ 150.7 (d)(1)(vi)
Fixed Price Forward Activity	§ 150.7 (d)(1)(vii)
Unsold, Unfilled, Anticipated	§ 150.7 (d)(1)(viii)
Maximum expected Hedge	§ 150.7 (d)(1)(ix)
Section B:	Monthly update of actuals and estimated utilization of the anticipatory hedge in the initial statement
Anticipated Activity	§ 150.1 BFH definition (3)(iii), (4)(i),(4)(iii), (4)(iv), or (5)
Cash Commodity	§ 150.7 (f)(1)(i)
Units	Units of measure for cash commodity being hedged
Cash commodity and CRFC	§ 150.7 (f)(1)(iii)
Activity for the reporting month	§ 150.7 (f)(1)(iv)
Cumulative activity	§ 150.7 (f)(1)(v)
Estimated remaining activity	§ 150.7 ff)(1)(vi)
Fixed Price forward for Month	§ 150.7 (f)(1)(vii)
Remaining anticipated	§ 150.7 (f)(1)(viii)
Remaining maximum Hedge	§ 150.7 (f)(1)(ix)
Signature/Authentication:	All filers.

Submitting Form 704: Once completed, please submit this form to the Commission pursuant to the instructions on [www.cftc.gov] or as otherwise directed by Commission staff. If submission attempts fail, the reporting trader shall contact the Commission at [techsupport@cftc.gov] for further technical support.

Please be advised that pursuant to 5 CFR 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

COMMODITY FUTURES TRADING COMMISSION FORM 704 - STATEMENT OF ANTICIPATORY BONA FIDE HEDGE EXEMPTIONS

CFTC CODE NO. [INSERT]			OMB No. XXXX-XXXX
Identifying Information			
Identification Codes			
NFA ID	Legal Entity Identifier (LEI)		Other CFTC Identifier
Name of Non-Natural Person			
Name of Natural Person			
First Name	Middle Name	Last Name	Suffix
Contact Information			
Address	Phone Number	Email Address	

NOTICE: Failure to file a report required by the Commodity Exchange Act ("CEA" or the "Act") and the regulations thereunder, or the filing of a report with the Commodity Futures Trading Commission ("CFTC" or "Commission") that includes a false, misleading or fraudulent statement or omits material facts that are required to be reported therein or are necessary to make the report not misleading, may (a) constitute a violation of § 6(c)(2) of the Act (7 U.S.C. 9), § 9(a)(3) of the Act (7 U.S.C. 13(a)(3)), and/or § 1001 of Title 18, Crimes and Criminal Procedure (18 U.S.C. 1001) and (b) result in punishment by fine or imprisonment, or both. Please be advised that pursuant to 5 CFR § 1320.5(b)(2)(i), you are not required to respond to this collection of information unless it displays a currently valid OMB control number.

A. Initial Anticipatory Exemption Statement and Supplemental Statement for Change in Anticipatory Activity pursuant to § 150.7 (d) and (e)

Anticipated Activity (Production, Requirements, Royalty Receipts, Service Contract Payments or Receipt)	Type and Name of Cash Commodity Underlying Anticipated Activity	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Core Referenced Futures contract (CRFC)	Cash Commodity Same as (S) or Cross-hedged (C-H) with Core Reference Futures Contract (CRFC)	Annual Production, Requirements, Royalty Receipts, Service Contract Payments or Receipts for Preceding Three Years	Specified Time Period for which Anticipatory Hedge Exemption is Claimed	Anticipated Activity for Such specified Time Period in Futures Equivalent	Fixed-Price Forward sales, Inventory, and Fixed Price Forward Purchases	Unsold, Unfilled and Anticipated Activity	Maximum Number of Long or Short Positions in RC expected to be used to offset Anticipated Activity

B. Annual Update Statement on the Utilization of Anticipatory Exemption pursuant to § 150.7 (f)									
Anticipated Activity (Production, Requirements, Royalty Receipts, Service Contract Payments or Receipt)	Type and Name of Cash Commodity Underlying Anticipated Activity	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Core Referenced Futures contract (CRFC)	Cash Commodity Same as (S) or Cross-hedged (C-H) with Core Reference Futures Contract (CRFC)	Actual Production, Requirements, Royalty Receipts, Service Contract Payments or Receipts for the Month	Cumulative Actual Production, Requirements, Royalty Receipts, Service Contract Payments or Receipts for All Months since the Initial Statement	Estimated Anticipated Activity for the Remainder of Such specified Time Period in Futures Equivalent	Fixed-Price Forward sales, Inventory, and Fixed Price Forward Purchases for the Month	Remaining Unsold, Unfilled and Other Anticipated Activity for the Specified Period	Maximum Number of Long or Short Positions in RC expected to be used to offset Anticipated Activity for the Remainder of the Specified Period

Please sign/authenticate the Form 704 prior to submitting.

Signature/ Electronic Authentication:

□ By checking this box and submitting this form (or by clicking "submit," "send," or any other analogous transmission command if transmitting electronically), I certify that I am duly authorized by the reporting trader identified below to provide the information and representations submitted on this Form 704, and that the information and representations are true and correct.

Reporting Trader Authorized Representative (Name and Position):

____________________ (Name)

____________________ (Position)

Submitted on behalf of:

____________________ (Reporting Trader Name)

Date of Submission:

____

Form 704, Example A – A producer files an initial anticipatory exemption for anticipated production of crude oil for the next three years. The producer had production over the prior three calendar years (15 million, 18 million, and 20 million barrels) and is highly certain of anticipated production for the next 3 calendar years of 20 million barrels per year. The producer has no forward sales; hence, the full 60 million barrels of anticipated production (20 million barrels of anticipated production per year for three years) is unsold anticipated production. The unit of trading for the NYMEX Light Sweet Crude Oil futures contract (CL) is 1,000 barrels. The maximum hedge would be a short position of 60,000 contracts in the NYMEX CL contract.

A. Initial Anticipatory Exemption Statement and Supplemental Statement for Change in Anticipatory Activity pursuant to § 150.7 (d) and (e)									
Anticipated Activity (Production, Requirements, Royalty Receipts, Service Contract Payments or Receipt)	Type and Name of Cash Commodity Underlying Anticipated Activity	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Cash Commodity Same as (S) or Cross-hedged (C-H) with Core Reference Futures Contract (CRFC)	Annual Production, Requirements, Royalty Receipts, Service Contract Payments or Receipts for Preceding Three Years	Specified Time Period for which Anticipatory Hedge Exemption is Claimed	Anticipated Activity for Such specified Time Period in Futures Equivalent	Fixed-Price Forward sales, Inventory, and Fixed Price Forward Purchases	Unsold, Unfilled and Anticipated Activity	Maximum Number of Long or Short Positions in RC expected to be used to offset Anticipated Activity
Production	Crude oil	(m='000,000) Bbls	CL - NYMEX	2010-15m 2011-18m 2012-20m	3 years	60,000	0	60,000	-60,000

Form 704, Example B. After one year, the producer in Example A files an annual update. Actual production for the prior year was 20 million barrels, as forecasted. The producer remains highly certain of 40 million barrels of production (20 million barrels of crude oil for each of the next two years). The producer has sold forward 10 million barrels. Hence, remaining unsold anticipated production is 30 million barrels. The maximum hedge would be a short position of 30,000 contracts in the NYMEX CL contract.

B. Statement of Annual Update on the Utilization of Anticipatory Exemption pursuant to § 150.7 (f)

Anticipated Activity (Production, Requirements, Royalty Receipts, Service Contract Payments or Receipt)	Type and Name of Cash Commodity Underlying Anticipated Activity	Units for Cash Commodity (Specify Tons, CWT, Lbs., Bu., Bbls., etc.)	Cash Commodity Same as (S) or Cross-hedged (C-H) with Core Reference Futures Contract (CRFC)	Actual Production, Requirements, Royalty Receipts, Service Contract Payments or Receipts for the Month	Cumulative Actual Production, Requirements, Royalty Receipts, Service Contract Payments or Receipts for All Months since the Initial Statement	Estimated Anticipated Activity for the Remainder of Such specified Time Period in Futures Equivalent	Fixed-Price Forward sales, Inventory, and Fixed Price Forward Purchases for the Year	Remaining Unsold, Unfilled and Anticipated Activity for the Specified Period	Maximum Number of Long or Short Positions in RC expected to be used to offset Anticipated Activity for the Remainder of the Specified Period
Production	Crude oil	(m='000,000) Bbls	CL - NYMEX	2013-20m	1 year	40,000	-10,000	30,000	-30,000

PART 32—REGULATION OF COMMODITY OPTION TRANSACTIONS

■ 12. The authority citation for part 32 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6c, and 12a, unless otherwise noted.

■ 13. Amend § 32.3 by revising paragraph (c)(2) to read as follows:

§ 32.3 Trade options.

* * * * *

(c) * * *

(2) Part 150 (Position Limits) of this chapter;

* * * * *

PART 37—SWAP EXECUTION FACILITIES

■ 14. The authority citation for part 37 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a–2, 7b–3, and 12a, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376

■ 15. Revise § 37.601 to read as follows:

§ 37.601 Additional sources for compliance.

A swap execution facility that is a trading facility must meet the requirements of part 150 of this chapter, as applicable.

■ 16. In Appendix B to part 37, under the heading Core Principle 6 of Section 5H of the Act, revise the introductory text of paragraph (B) and paragraph (B)(2)(a) to read as follows:

Appendix B to Part 37—Guidance on, and Acceptable Practices in, Compliance with Core Principles

* * * * *

CORE PRINCIPLE 6 OF SECTION 5H OF THE ACT—POSITION LIMITS OR ACCOUNTABILITY

* * * * *

(B) *Position limits.* For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a) of the Act, the swap execution facility that is a trading facility shall:

* * * * *

(2) * * *

(a) *Guidance.* A swap execution facility that is a trading facility must meet the requirements of part 150 of this chapter, as applicable. A swap execution facility that is not a trading facility should consider part 150 of this chapter as guidance.

* * * * *

PART 38—DESIGNATED CONTRACT MARKETS

■ 17. The authority citation for part 38 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6c, 6d, 6e, 6f, 6g, 6i, 6j, 6k, 6l, 6m, 6n, 7, 7a–2, 7b, 7b–1, 7b–3, 8, 9, 15, and 21, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376.

■ 18. Revise § 38.301 to read as follows:

§ 38.301 Position limitations and accountability.

A designated contract market must meet the requirements of part 150 of this chapter, as applicable.

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

■ 19. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2(a)(12), 13(c), 13(d), 13(e), and 16(b).

§ 140.97 [Removed and Reserved]

■ 20. Remove and reserve § 140.97.

PART 150—LIMITS ON POSITIONS

■ 21. The authority citation for part 150 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6c, 6f, 6g, 6t, 12a, 19, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 22. Revise § 150.1 to read as follows:

§ 150.1 Definitions.

As used in this part—

Basis contract means a commodity derivative contract that is cash-settled based on the difference in:

(1) The price, directly or indirectly, of:

(i) A particular core referenced futures contract; or

(ii) A commodity deliverable on a particular core referenced futures contract, whether at par, a fixed discount to par, or a premium to par; and

(2) The price, at a different delivery location or pricing point than that of the same particular core referenced futures contract, directly or indirectly, of:

(i) A commodity deliverable on the same particular core referenced futures contract, whether at par, a fixed discount to par, or a premium to par; or

(ii) A commodity that is listed in Appendix B of this part as substantially the same as a commodity underlying the same core referenced futures contract.

Bona fide hedging position means any position whose purpose is to offset price risks incidental to commercial cash, spot, or forward operations, and such position is established and liquidated in an orderly manner in accordance with sound commercial practices, *provided that:*

(1) *Hedges of an excluded commodity.* For a position in commodity derivative contracts in an excluded commodity, as that term is defined in section 1a(19) of the Act:

(i) Such position is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise; and

(ii)(A) Is enumerated in paragraph (3), (4) or (5) of this definition; or

(B) Such position is recognized as a bona fide hedging position by the designated contract market or swap execution facility that is a trading facility, pursuant to such market's rules submitted to the Commission, which rules may include risk management exemptions consistent with Appendix A of this part; and

(2) *Hedges of a physical commodity.* For a position in commodity derivative contracts in a physical commodity:

(i) Such position:

(A) Represents a substitute for transactions made or to be made, or positions taken or to be taken, at a later time in a physical marketing channel;

(B) Is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise;

(C) Arises from the potential change in the value of—

(*1*) Assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;

(*2*) Liabilities which a person owes or anticipates incurring; or

(3) Services that a person provides, purchases, or anticipates providing or purchasing; and

(D) Is enumerated in paragraph (3), (4) or (5) of this definition; or

(ii)(A) *Pass-through swap offsets.* Such position reduces risks attendant to a position resulting from a swap in the same physical commodity that was executed opposite a counterparty for which the position at the time of the transaction would qualify as a bona fide hedging position pursuant to paragraph (2)(i) of this definition (a pass-through swap counterparty), *provided that* no such risk-reducing position is maintained in any physical-delivery commodity derivative contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery commodity derivative contract; and

(B) *Pass-through swaps.* Such swap position was executed opposite a pass-through swap counterparty and to the extent such swap position has been offset pursuant to paragraph (2)(ii)(A) of this definition.

(3) *Enumerated hedging positions.* A bona fide hedging position includes any of the following specific positions:

(i) *Hedges of inventory and cash commodity purchase contracts.* Short positions in commodity derivative contracts that do not exceed in quantity ownership or fixed-price purchase contracts in the contract's underlying cash commodity by the same person.

(ii) *Hedges of cash commodity sales contracts.* Long positions in commodity derivative contracts that do not exceed in quantity the fixed-price sales contracts in the contract's underlying cash commodity by the same person and the quantity equivalent of fixed-price sales contracts of the cash products and by-products of such commodity by the same person.

(iii) *Hedges of unfilled anticipated requirements. Provided that* such positions in a physical-delivery commodity derivative contract, during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract, do not exceed the person's unfilled anticipated requirements of the same cash commodity for that month and for the next succeeding month:

(A) Long positions in commodity derivative contracts that do not exceed in quantity unfilled anticipated requirements of the same cash commodity, and that do not exceed twelve months for an agricultural commodity, for processing, manufacturing, or use by the same person; and

(B) Long positions in commodity derivative contracts that do not exceed in quantity unfilled anticipated requirements of the same cash commodity for resale by a utility that is required or encouraged to hedge by its public utility commission on behalf of its customers' anticipated use.

(iv) *Hedges by agents.* Long or short positions in commodity derivative contracts by an agent who does not own or has not contracted to sell or purchase the offsetting cash commodity at a fixed price, *provided that* the agent is responsible for merchandising the cash positions that are being offset in commodity derivative contracts and the agent has a contractual arrangement with the person who owns the commodity or holds the cash market commitment being offset.

(4) *Other enumerated hedging positions.* A bona fide hedging position also includes the following specific positions, *provided that* no such position is maintained in any physical-delivery commodity derivative contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract:

(i) *Hedges of unsold anticipated production.* Short positions in commodity derivative contracts that do not exceed in quantity unsold anticipated production of the same commodity, and that do not exceed twelve months of production for an agricultural commodity, by the same person.

(ii) *Hedges of offsetting unfixed-price cash commodity sales and purchases.* Short and long positions in commodity derivative contracts that do not exceed in quantity that amount of the same cash commodity that has been bought and sold by the same person at unfixed prices:

(A) Basis different delivery months in the same commodity derivative contract; or

(B) Basis different commodity derivative contracts in the same commodity, regardless of whether the commodity derivative contracts are in the same calendar month.

(iii) *Hedges of anticipated royalties.* Short positions in commodity derivative contracts offset by the anticipated change in value of mineral royalty rights that are owned by the same person, *provided that* the royalty rights arise out of the production of the commodity underlying the commodity derivative contract.

(iv) *Hedges of services.* Short or long positions in commodity derivative contracts offset by the anticipated change in value of receipts or payments due or expected to be due under an executed contract for services held by the same person, *provided that* the contract for services arises out of the production, manufacturing, processing, use, or transportation of the commodity underlying the commodity derivative contract, and which may not exceed one year for agricultural commodities.

(5) *Cross-commodity hedges.* Positions in commodity derivative contracts described in paragraph (2)(ii), paragraphs (3)(i) through (iv) and paragraphs (4)(i) through (iv) of this definition may also be used to offset the risks arising from a commodity other than the same cash commodity underlying a commodity derivative contract, *provided that* the fluctuations in value of the position in the commodity derivative contract, or the commodity underlying the commodity derivative contract, are substantially related to the fluctuations in value of the actual or anticipated cash position or pass-through swap and no such position is maintained in any physical-delivery commodity derivative contract during the lesser of the last five days of trading or the time period for the spot month in such physical-delivery contract.

Commodity derivative contract means, for this part, any futures, option, or swap contract in a commodity (other than a security futures product as defined in section 1a(45) of the Act).

Core referenced futures contract means a futures contract that is listed in § 150.2(d).

Eligible affiliate. An eligible affiliate means an entity with respect to which another person:

(1) Directly or indirectly holds either:

(i) A majority of the equity securities of such entity, or

(ii) The right to receive upon dissolution of, or the contribution of, a majority of the capital of such entity;

(2) Reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of such entity; and

(3) Is required to aggregate the positions of such entity under § 150.4 and does not claim an exemption from aggregation for such entity.

Eligible entity means a commodity pool operator; the operator of a trading vehicle which is excluded or which itself has qualified for exclusion from the definition of the term ''pool'' or ''commodity pool operator,'' respectively, under § 4.5 of this chapter; the limited partner, limited member or shareholder in a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter; a commodity trading advisor; a bank or trust company; a savings association; an insurance company; or the separately organized affiliates of any of the above entities:

(1) Which authorizes an independent account controller independently to control all trading decisions with respect to the eligible entity's client positions and accounts that the independent account controller holds directly or indirectly, or on the eligible entity's behalf, but without the eligible entity's day-to-day direction; and

(2) Which maintains:

(i) Only such minimum control over the independent account controller as is consistent with its fiduciary responsibilities to the managed positions and accounts, and necessary to fulfill its duty to supervise diligently the trading done on its behalf; or

(ii) If a limited partner, limited member or shareholder of a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter, only such limited control as is consistent with its status.

Entity means a ''person'' as defined in section 1a of the Act.

Excluded commodity means an ''excluded commodity'' as defined in section 1a of the Act.

Futures-equivalent means

(1) An option contract, whether an option on a future or an option that is a swap, which has been adjusted by an economically reasonable and analytically supported risk factor, or delta coefficient, for that option computed as of the previous day's close or the current day's close or contemporaneously during the trading day, and;

(2) A swap which has been converted to an economically equivalent amount of an open position in a core referenced futures contract.

Independent account controller means a person—

(1) Who specifically is authorized by an eligible entity, as defined in this section, independently to control trading decisions on behalf of, but without the day-to-day direction of, the eligible entity;

(2) Over whose trading the eligible entity maintains only such minimum control as is consistent with its fiduciary responsibilities for managed positions and accounts to fulfill its duty to supervise diligently the trading done on its behalf or as is consistent with such other legal rights or obligations which may be incumbent upon the eligible entity to fulfill;

(3) Who trades independently of the eligible entity and of any other independent account controller trading for the eligible entity;

(4) Who has no knowledge of trading decisions by any other independent account controller; and

(5) Who is

(i) Registered as a futures commission merchant, an introducing broker, a commodity trading advisor, or an associated person of any such registrant, or

(ii) A general partner, managing member or manager of a commodity pool the operator of which is excluded from registration under § 4.5(a)(4) of this chapter or § 4.13 of this chapter, provided that such general partner, managing member or manager complies with the requirements of § 150.4(c).

Intermarket spread position means a long position in a commodity derivative contract in a particular commodity at a particular designated contract market or swap execution facility and a short position in another commodity derivative contract in that same commodity away from that particular designated contract market or swap execution facility.

Intramarket spread position means a long position in a commodity derivative contract in a particular commodity and a short position in another commodity derivative contract in the same commodity on the same designated contract market or swap execution facility.

Long position means a long call option, a short put option or a long underlying futures contract, or a long futures-equivalent swap.

Physical commodity means any agricultural commodity as that term is defined in § 1.3 of this chapter or any exempt commodity as that term is defined in section 1a(20) of the Act.

Pre-enactment swap means any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which have not expired as of the date of enactment of that Act.

Pre-existing position means any position in a commodity derivative contract acquired in good faith prior to the effective date of any bylaw, rule, regulation or resolution that specifies an initial speculative position limit level or a subsequent change to that level.

Referenced contract means, on a futures equivalent basis with respect to a particular core referenced futures contract, a core referenced futures contract listed in § 150.2(d), or a futures contract, options contract, or swap, and excluding any guarantee of a swap, a basis contract, or a commodity index contract:

(1) That is:

(i) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular core referenced futures contract; or

(ii) Directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location or locations as specified in that particular core referenced futures contract; and

(2) Where:

(i) *Calendar spread contract* means a cash-settled agreement, contract, or transaction that represents the difference between the settlement price in one or a series of contract months of an agreement, contract or transaction and the settlement price of another contract month or another series of contract months' settlement prices for the same agreement, contract or transaction;

(ii) *Commodity index contract* means an agreement, contract, or transaction that is not a basis or any type of spread contract, based on an index comprised of prices of commodities that are not the same or substantially the same;

(iii) *Spread contract* means either a calendar spread contract or an intercommodity spread contract; and

(iv) *Intercommodity spread contract* means a cash-settled agreement, contract or transaction that represents the difference between the settlement price of a referenced contract and the settlement price of another contract, agreement, or transaction that is based on a different commodity.

Short position means a short call option, a long put option or a short underlying futures contract, or a short futures-equivalent swap.

Speculative position limit means the maximum position, either net long or net short, in a commodity derivatives contract that may be held or controlled by one person, absent an exemption, such as an exemption for a bona fide hedging position. This limit may apply to a person's combined position in all commodity derivative contracts in a particular commodity (all-months-combined), a person's position in a single month of commodity derivative contracts in a particular commodity, or a person's position in the spot month of commodity derivative contacts in a particular commodity. Such a limit may be established under federal regulations or rules of a designated contract market or swap execution facility. An exchange may also apply other limits, such as a limit on gross long or gross short positions, or a limit on holding or controlling delivery instruments.

Spot month means—

(1) For physical-delivery commodity derivative contracts, the period of time beginning at the earlier of the close of trading on the trading day preceding the first day on which delivery notices can be issued to the clearing organization of a contract market, or the close of trading on the trading day preceding the third-to-last trading day, until the contract is no longer listed for trading (or available for transfer, such as through exchange for physical transactions).

(2) For cash-settled contracts, spot month means the period of time beginning at the earlier of the close of trading on the trading day preceding the period in which the underlying cash-settlement price is calculated, or the close of trading on the trading day preceding the third-to-last trading day, until the contract cash-settlement price is determined and published; provided however, if the cash-settlement price is determined based on prices of a core referenced futures contract during the spot month period for that core

referenced futures contract, then the spot month for that cash-settled contract is the same as the spot month for that core referenced futures contract.

Swap means ''swap'' as that term is defined in section 1a of the Act and as further defined in § 1.3 of this chapter.

Swap dealer means ''swap dealer'' as that term is defined in section 1a of the Act and as further defined in § 1.3 of this chapter.

Transition period swap means a swap entered into during the period commencing after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010), and ending 60 days after the publication in the **Federal Register** of final amendments to part 150 of this chapter implementing section 737 of the Dodd-Frank Act of 2010.

■ 23. Revise § 150.2 to read as follows:

§ 150.2 Speculative position limits.

(a) *Spot-month speculative position limits.* No person may hold or control positions in referenced contracts in the spot month, net long or net short, in excess of the level specified by the Commission for:

(1) Physical-delivery referenced contracts; and, separately,

(2) Cash-settled referenced contracts;

(b) *Single-month and all-months-combined speculative position limits.* No person may hold or control positions, net long or net short, in referenced contracts in a single month or in all months combined (including the spot month) in excess of the levels specified by the Commission.

(c) For purposes of this part:

(1) The spot month and any single month shall be those of the core referenced futures contract; and

(2) An eligible affiliate is not required to comply separately with speculative position limits.

(d) *Core referenced futures contracts.* Speculative position limits apply to referenced contracts based on the core referenced futures contracts listed in the following table:

CORE REFERENCED FUTURES CONTRACTS

Commodity type	Designated contract market	Core referenced futures contract [1]
(1) Legacy Agricultural.		
	Chicago Board of Trade.	
		Corn (C). Oats (O). Soybeans (S). Soybean Meal (SM). Soybean Oil (SO). Wheat (W).
	Kansas City Board of Trade.	
		Hard Winter Wheat (KW).
	ICE Futures U.S.	
		Cotton No. 2 (CT).
	Minneapolis Grain Exchange.	
		Hard Red Spring Wheat (MWE).
(2) Other Agricultural.		
	Chicago Board of Trade.	
		Rough Rice (RR).
	Chicago Mercantile Exchange.	
		Class III Milk (DA). Feeder Cattle (FC). Lean Hog (LH). Live Cattle (LC).
	ICE Futures U.S.	
		Cocoa (CC). Coffee C (KC). FCOJ–A (OJ). U.S. Sugar No. 11 (SB). U.S. Sugar No. 16 (SF).
(3) Energy.		
	New York Mercantile Exchange.	
		Light Sweet Crude Oil (CL). NY Harbor ULSD (HO). RBOB Gasoline (RB). Henry Hub Natural Gas (NG).
(4) Metals.		
	Commodity Exchange, Inc.	
		Gold (GC). Silver (SI). Copper (HG).
	New York Mercantile Exchange.	
		Palladium (PA). Platinum (PL).

[1] The core referenced futures contract includes any successor contracts.

(e) *Levels of speculative position limits.* (1) *Initial levels.* The initial levels of speculative position limits are fixed by the Commission at the levels listed in Appendix D of this part and shall be effective 60 days after publication in the **Federal Register**.

(2) *Subsequent levels.* (i) The Commission shall fix subsequent levels of speculative position limits in accordance with the procedures in this

section and publish such levels on the Commission's Web site at *http://www.cftc.gov*.

(ii) Such subsequent speculative position limit levels shall each apply beginning on the close of business of the last business day of the second complete calendar month after publication of such levels; *provided however,* if such close of business is in a spot month of a core referenced futures contract, the subsequent spot-month level shall apply beginning with the next spot month for that contract.

(iii) All subsequent levels of speculative position limits shall be rounded up to the nearest hundred contracts.

(3) *Procedure for computing levels of spot-month limits.* (i) No less frequently than every two calendar years, the Commission shall fix the level of the spot-month limit no greater than one-quarter of the estimated spot-month deliverable supply in the relevant core referenced futures contract. Unless the Commission determines to rely on its own estimate of deliverable supply, the Commission shall utilize the estimated spot-month deliverable supply provided by a designated contract market.

(ii) Each designated contract market in a core referenced futures contract shall supply to the Commission an estimated spot-month deliverable supply. A designated contract market may use the guidance regarding deliverable supply in Appendix C of part 38 of this chapter. Each estimate must be accompanied by a description of the methodology used to derive the estimate and any statistical data supporting the estimate, and must be submitted no later than the following:

(A) For energy commodities, January 31 of the second calendar year following the most recent Commission action establishing such limit levels;

(B) For metals commodities, March 31 of the second calendar year following the most recent Commission action establishing such limit levels;

(C) For legacy agricultural commodities, May 31 of the second calendar year following the most recent Commission action establishing such limit levels; and

(D) For other agricultural commodities, August 31 of the second calendar year following the most recent Commission action establishing such limit levels.

(4) *Procedure for computing levels of single-month and all-months-combined limits.* No less frequently than every two calendar years, the Commission shall fix the level, for each referenced contract, of the single-month limit and the all-months-combined limit. Each such limit shall be based on 10 percent of the estimated average open interest in referenced contracts, up to 25,000 contracts, with a marginal increase of 2.5 percent thereafter.

(i) *Time periods for average open interest.* The Commission shall estimate average open interest in referenced contracts based on the largest annual average open interest computed for each of the past two calendar years. The Commission may estimate average open interest in referenced contracts using either month-end open contracts or open contracts for each business day in the time period, as practical.

(ii) *Data sources for average open interest.* The Commission shall estimate average open interest in referenced contracts using data reported to the Commission pursuant to part 16 of this chapter, and open swaps reported to the Commission pursuant to part 20 of this chapter or data obtained by the Commission from swap data repositories collecting data pursuant to part 45 of this chapter. Options listed on designated contract markets shall be adjusted using an option delta reported to the Commission pursuant to part 16 of this chapter. Swaps shall be counted on a futures equivalent basis, equal to the economically equivalent amount of core referenced futures contracts reported pursuant to part 20 of this chapter or as calculated by the Commission using swap data collected pursuant to part 45 of this chapter.

(iii) *Publication of average open interest.* The Commission shall publish estimates of average open interest in referenced contracts on a monthly basis, as practical, after such data is submitted to the Commission.

(iv) *Minimum levels. Provided however,* notwithstanding the above, the minimum levels shall be the greater of the level of the spot month limit determined under paragraph (e)(3) of this section and 1,000 for referenced contracts in an agricultural commodity or 5,000 for referenced contracts in an exempt commodity.

(f) *Pre-existing Positions*—(1) *Pre-existing positions in a spot-month.* Other than pre-enactment and transition period swaps exempted under § 150.3(d), a person shall comply with spot month speculative position limits.

(2) *Pre-existing positions in a non-spot-month.* A single-month or all-months-combined speculative position limit established under this section shall not apply to any commodity derivative contract acquired in good faith prior to the effective date of such limit, provided, however, that if such position is not a pre-enactment or transition period swap then that position shall be attributed to the person if the person's position is increased after the effective date of such limit.

(g) *Positions on Foreign Boards of Trade.* The aggregate speculative position limits established under this section shall apply to a person with positions in referenced contracts executed on, or pursuant to the rules of a foreign board of trade, provided that:

(1) Such referenced contracts settle against any price (including the daily or final settlement price) of one or more contracts listed for trading on a designated contract market or swap execution facility that is a trading facility; and

(2) The foreign board of trade makes available such referenced contracts to its members or other participants located in the United States through direct access to its electronic trading and order matching system.

(h) *Anti-evasion provision.* For the purposes of applying the speculative position limits in this section, a commodity index contract used to circumvent speculative position limits shall be considered to be a referenced contract.

(1) *Delegation of authority to the Director of the Division of Market Oversight.* (i) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority in paragraph (e) of this section to fix and publish subsequent levels of speculative position limits.

(ii) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(iii) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

(iv) The Commission will periodically update these initial levels for speculative position limits and publish such subsequent levels on its Web site at: *http://www.cftc.gov*.

(2) Reserved.

■ 24. Revise § 150.3 to read as follows:

§ 150.3 Exemptions.

(a) *Positions which may exceed limits.* The position limits set forth in § 150.2 may be exceeded to the extent that:

(1) Such positions are:

(i) Bona fide hedging positions as defined in § 150.1, *provided that* for anticipatory bona fide hedge positions under paragraphs (3)(iii), (4)(i), (4)(iii), and (4)(iv) of the bona fide hedging position definition in § 150.1 the person complies with the filing procedure found in § 150.7;

(ii) Financial distress positions exempted under paragraph (b) of this section;

(iii) Conditional spot-month limit positions exempted under paragraph (c) of this section; or

(iv) Other positions exempted under paragraph (e) of this section; and that

(2) The recordkeeping requirements of paragraph (g) of this section are met; and further that

(3) The reporting requirements of part 19 of this chapter are met.

(b) *Financial distress exemptions.* Upon specific request made to the Commission, the Commission may exempt a person or related persons under financial distress circumstances for a time certain from any of the requirements of this part. Financial distress circumstances include situations involving the potential default or bankruptcy of a customer of the requesting person or persons, an affiliate of the requesting person or persons, or a potential acquisition target of the requesting person or persons.

(c) *Conditional spot-month limit exemption.* The position limits set forth in § 150.2 may be exceeded for cash-settled referenced contracts *provided that* such positions do not exceed five times the level of the spot-month limit specified by the Commission and the person holding or controlling such positions does not hold or control positions in spot-month physical-delivery referenced contracts.

(d) *Pre-enactment and transition period swaps exemption.* The speculative position limits set forth in § 150.2 shall not apply to positions acquired in good faith in any pre-enactment swap, or in any transition period swap, in either case as defined by § 150.1, *provided, however,* that a person may net such positions with post-effective date commodity derivative contracts for the purpose of complying with any non-spot-month speculative position limit.

(e) *Other exemptions.* Any person engaging in risk-reducing practices commonly used in the market, which they believe may not be specifically enumerated in the definition of bona fide hedging position in § 150.1, may request:

(1) An interpretative letter from Commission staff, under § 140.99 of this chapter, concerning the applicability of the bona fide hedging position exemption; or

(2) Exemptive relief from the Commission under section 4a(a)(7) of the Act.

(3) Appendix C of this part provides a non-exhaustive list of examples of bona fide hedging positions as defined under § 150.1.

(f) *Previously granted exemptions.* Exemptions granted by the Commission under § 1.47 of this chapter for swap risk management shall not apply to swap positions entered into after the effective date of initial position limits implementing section 737 of the Dodd-Frank Act of 2010.

(g) *Recordkeeping.* (1) Persons who avail themselves of exemptions under this section, including exemptions granted under section 4a(a)(7) of the Act, shall keep and maintain complete books and records concerning all details of their related cash, forward, futures, futures options and swap positions and transactions, including anticipated requirements, production and royalties, contracts for services, cash commodity products and by-products, and cross-commodity hedges, and shall make such books and records, including a list of pass-through swap counterparties, available to the Commission upon request under paragraph (h) of this section.

(2) Further, a party seeking to rely upon the pass-through swap offset in paragraph (2)(ii) of the definition of ''bona fide hedging position'' in § 150.1, in order to exceed the position limits of § 150.2 with respect to such a swap, may only do so if its counterparty provides a written representation (e.g., in the form of a field or other representation contained in a mutually executed trade confirmation) that, as to such counterparty, the swap qualifies in good faith as a ''bona fide hedging position,'' as defined in § 150.1, at the time the swap was executed. That written representation shall be retained by the parties to the swap for a period of at least two years following the expiration of the swap and furnished to the Commission upon request.

(3) Any person that represents to another person that a swap qualifies as a pass-through swap under paragraph (2)(ii) of the definition of ''bona fide hedging position'' in § 150.1 shall keep and make available to the Commission upon request all relevant books and records supporting such a representation for a period of at least two years following the expiration of the swap.

(h) *Call for information.* Upon call by the Commission, the Director of the Division of Market Oversight or the Director's delegate, any person claiming an exemption from speculative position limits under this section must provide to the Commission such information as specified in the call relating to the positions owned or controlled by that person; trading done pursuant to the claimed exemption; the commodity derivative contracts or cash market positions which support the claim of exemption; and the relevant business relationships supporting a claim of exemption.

(i) *Aggregation of accounts.* Entities required to aggregate accounts or positions under § 150.4 shall be considered the same person for the purpose of determining whether they are eligible for a bona fide hedging position exemption under paragraph (a)(1)(i) of this section with respect to such aggregated account or position.

(j) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority in paragraph (b) of this section to provide exemptions in circumstances of financial distress.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

■ 25. Revise § 150.5 to read as follows:

§ 150.5 Exchange-set speculative position limits.

(a) *Requirements and acceptable practices for commodity derivative contracts subject to federal position limits.* (1) For any commodity derivative contract that is subject to a speculative position limit under § 150.2, the designated contract market or swap execution facility that is a trading facility shall set a speculative position limit no higher than the level specified in § 150.2.

(2) *Exemptions.* (i) *Hedge exemption.* Any hedge exemption rules adopted by a designated contract markets or a swap execution facility that is a trading facility must conform to the definition of bona fide hedging position in § 150.1.

(ii) *Other exemptions.* In addition to the express exemptions specified in § 150.3, a designated contract market or swap execution facility that is a trading facility may grant other exemptions for:

(A) Intramarket spread positions as defined in § 150.1, provided that such positions must be outside of the spot month for physical-delivery contracts and must not exceed the all-months limit set forth in § 150.2 when combined with any other net positions in the single month;

(B) Intermarket spread positions as defined in § 150.1, provided that such positions must be outside of the spot month for physical-delivery contracts.

(iii) *Application for exemption.* Traders must apply to the designated contract market or swap execution facility that is a trading facility for any exemption from its speculative position limit rules. The designated contract market or swap execution facility that is a trading facility may limit bona fide hedging positions, or any other positions that have been exempted pursuant to § 150.3, which it determines are not in accord with sound commercial practices, or which exceed an amount that may be established and liquidated in an orderly fashion.

(3) *Pre-enactment and transition period swap positions.* Speculative position limits set forth in § 150.2 shall not apply to positions acquired in good faith in any pre-enactment swap, or in any transition period swap, in either case as defined by § 150.1. *Provided, however,* that a designated contract market or swap execution facility that is a trading facility shall allow a person to net such position with post-effective date commodity derivative contracts for the purpose of complying with any non-spot-month speculative position limit.

(4) *Pre-existing positions.* (i) *Pre-existing positions in a spot-month.* A designated contract market or swap execution facility that is a trading facility must require compliance with spot month speculative position limits for pre-existing positions in commodity derivative contracts other than pre-enactment and transition period swaps.

(ii) *Pre-existing positions in a non-spot-month.* A single-month or all-months-combined speculative position limit established under § 150.2 shall not apply to any commodity derivative contract acquired in good faith prior to the effective date of such limit, *provided, however,* that such position shall be attributed to the person if the person's position is increased after the effective date of such limit.

(5) *Aggregation.* Designated contract markets and swap execution facilities that are trading facilities must have aggregation rules that conform to § 150.4.

(6) *Additional acceptable practices.* A designated contract market or swap execution facility that is a trading facility may:

(i) Impose additional restrictions on a person with a long position in the spot month of a physical-delivery contract who stands for delivery, takes that delivery, then re-establishes a long position;

(ii) Establish limits on the amount of delivery instruments that a person may hold in a physical-delivery contract; and

(iii) Impose such other restrictions as it deems necessary to reduce the potential threat of market manipulation or congestion, to maintain orderly execution of transactions, or for such other purposes consistent with its responsibilities.

(b) *Requirements and acceptable practices for commodity derivative contracts that are not subject to the limits set forth in § 150.2, including derivative contracts in a physical commodity as defined in § 150.1 and in an excluded commodity as defined in section 1a(19) of the Act*—(1) *Levels at initial listing.* At the time of each commodity derivative contract's initial listing, a designated contract market or swap execution facility that is a trading facility should base speculative position limits on the following:

(i) *Spot month position limits.* (A) *Commodities with a measurable deliverable supply.* For all commodity derivative contracts not subject to the limits set forth in § 150.2 that are based on a commodity with a measurable deliverable supply, the spot month limit level should be established at a level that is no greater than one-quarter of the estimated spot month deliverable supply, calculated separately for each month to be listed (Designated Contract Markets and Swap Execution Facilities may refer to the guidance in paragraph (b)(1)(i) of Appendix C of part 38 for guidance on estimating spot-month deliverable supply);

(B) *Commodities without a measurable deliverable supply.* For commodity derivative contracts that are based on a commodity with no measurable deliverable supply, the spot month limit level should be set at a level that is necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.

(ii) *Individual non-spot or all-months-combined position limits.* (A) *Agricultural commodity derivative contracts.* For agricultural commodity derivative contracts not subject to the limits set forth in § 150.2, the individual non-spot or all-months-combined levels should be no greater than 1,000 contracts, when the notional quantity per contract is no larger than a typical cash market transaction in the underlying commodity. If the notional quantity per contract is larger than the typical cash market transaction, then the individual non-spot month limit or all-months combined limit level should be scaled down accordingly. If the commodity derivative contract is substantially the same as a pre-existing designated contract market or swap execution facility commodity derivative contract, then the designated contract or swap execution facility may adopt the same limit as applies to that pre-existing commodity derivative contract;

(B) *Exempt or excluded commodity derivative contracts.* For exempt commodity derivative contracts not subject to the limits set forth in § 150.2 or excluded commodity derivative contracts, the individual non-spot or all-months-combined levels should be no greater than 5,000 contracts, when the notional quantity per contract is no larger than a typical cash market transaction in the underlying commodity. If the notional quantity per contract is larger than the typical cash market transaction, then the individual non-spot month limit or all-months combined limit level should be scaled down accordingly. If the commodity derivative contract is substantially the same as a pre-existing commodity derivative contract, then the designated contract market or swap execution facility may adopt the same limit as applies to that pre-existing commodity derivative contract.

(iii) *Commodity derivative contracts that are cash-settled by referencing a daily settlement price of an existing contract.* For commodity derivative contracts that are cash-settled by referencing a daily settlement price of an existing contract listed on a designated contract market or swap execution facility that is a trading facility, the cash-settled contract should adopt the same spot-month, individual non-spot-month, and all-months-combined position limits as the original price referenced contract.

(2) *Adjustments to levels.* Designated contract markets and swap execution facilities that are trading facilities should adjust their speculative limit levels as follows:

(i) *Spot month position limits.* The spot month position limit level should be reviewed no less than once every twenty-four months from the date of initial listing and should be maintained at a level that is:

(A) No greater than one-quarter of the estimated spot month deliverable supply, calculated separately for each month to be listed; or

(B) In the case of a commodity derivative contract based on a commodity without a measurable deliverable supply, necessary and appropriate to reduce the potential threat of market manipulation or price distortion of the contract's or the underlying commodity's price or index.

(ii) *Individual non-spot or all-months-combined position limits.* Individual non-spot or all-months-combined levels should be no greater than 10% of the average combined futures and delta-adjusted option month-end open interest for the most recent calendar year up to 25,000 contracts, with a marginal increase of 2.5% thereafter, or be based on position sizes customarily held by speculative traders on the contract market. In any case, such levels should be reviewed no less than once every twenty-four months from the date of initial listing.

(3) *Position accountability in lieu of speculative position limits.* A designated contract market or swap execution facility that is a trading facility may adopt a bylaw, rule, regulation, or resolution, substituting for the exchange set speculative position limits specified under this paragraph (b), an exchange rule requiring traders to consent to provide information about their position upon request by the exchange and to consent to halt increasing further a trader's position or to reduce their positions in an orderly manner, in each case upon request by the exchange as follows:

(i) *Physical commodity derivative contracts.* On a physical commodity derivative contract that is not subject to the limits set forth in § 150.2, having an average month-end open interest of 50,000 contracts and an average daily volume of 5,000 or more contracts during the most recent calendar year and a liquid cash market, a designated contract market or swap execution facility that is a trading facility may adopt individual non-spot month or all-months-combined position accountability levels, *provided, however,* that such designated contract market or swap execution facility that is a trading facility should adopt a spot month speculative position limit with a level no greater than one-quarter of the estimated spot month deliverable supply;

(ii) *Excluded commodity derivative contracts*—(A) *Spot month.* On an excluded commodity derivative contract for which there is a highly liquid cash market and no legal impediment to delivery, a designated contract market or swap execution facility that is a trading facility may adopt position accountability in lieu of position limits in the spot month. For an excluded commodity derivative contract based on a commodity without a measurable deliverable supply, a designated contract market or swap execution facility that is a trading facility may adopt position accountability in lieu of position limits in the spot month. For all other excluded commodity derivative contracts, a designated contract market or swap execution facility that is a trading facility should adopt a spot-month position limit with a level no greater than one-quarter of the estimated deliverable supply;

(B) *Individual non-spot or all-months-combined position limits.* On an excluded commodity derivative contract, a designated contract market or swap execution facility that is a trading facility may adopt position accountability levels in lieu of position limits in the individual non-spot month or all-months-combined.

(iii) *New commodity derivative contracts that are substantially the same as an existing contract.* On a new commodity derivative contract that is substantially the same as an existing commodity derivative contract listed for trading on a designated contract market or swap execution facility that is a trading facility, which has adopted position accountability in lieu of position limits, the designated contract market or swap execution facility may adopt for the new contract when it is initially listed for trading the position accountability levels of the existing contract.

(4) *Calculation of trading volume and open interest.* For purposes of this paragraph, trading volume and open interest should be calculated by:

(i) *Open interest.* (A) Averaging the month-end open positions in a futures contract and its related option contract, on a delta-adjusted basis, for all months listed during the most recent calendar year; and

(B) Averaging the month-end futures-equivalent amount of open positions in swaps in a particular commodity (such as, for swaps that are not referenced contracts, by combining the notional month-end open positions in swaps in a particular commodity, including options in that same commodity that are swaps on a delta-adjusted basis, and dividing by a notional quantity per contract that is no larger than a typical cash market transaction in the underlying commodity).

(ii) *Trading volume.* (A) Counting the number of contracts in a futures contract and its related option contract, on a delta-adjusted basis, transacted during the most recent calendar year; and

(B) Counting the futures-equivalent number of swaps in a particular commodity transacted during the most recent calendar year.

(5) *Exemptions*—(i) *Hedge exemption.* Any hedge exemption rules adopted by a designated contract market or a swap execution facility that is a trading facility must conform to the definition of bona fide hedging position in § 150.1.

(ii) *Other exemptions.* In addition to the exemptions for bona fide hedging positions that conform to paragraph (b)(5)(i) of this section, a designated contract market or swap execution facility that is a trading facility may grant other exemptions for:

(A) *Financial distress.* Upon specific request made to the designated contract market or swap execution facility that is a trading facility, the designated contract market or swap execution facility that is a trading facility may exempt a person or related persons under financial distress circumstances for a time certain from any of the requirements of this part. Financial distress circumstances include situations involving the potential default or bankruptcy of a customer of the requesting person or persons, an affiliate of the requesting person or persons, or a potential acquisition target of the requesting person or persons;

(B) *Conditional spot-month limit exemption.* Exchange-set speculative position limits may be exceeded for cash-settled contracts *provided that* such positions should not exceed five times the level of the spot-month limit specified by the designated contract market or swap execution facility that is a trading facility and the person holding or controlling such positions should not hold or control positions in referenced spot-month physical-delivery contracts;

(C) *Intramarket spread positions* as defined in § 150.1, *provided that* such positions should be outside of the spot month for physical-delivery contracts and should not exceed the all-months limit when combined with any other net positions in the single month;

(D) *Intermarket spread positions* as defined in § 150.1, *provided that* such positions should be outside of the spot month for physical-delivery contracts; and/or

(E) For excluded commodities, a designated contract market or swap execution facility that is a trading facility may grant a limited risk management exemption pursuant to rules submitted to the Commission, consistent with the guidance in Appendix A of this part.

(iii) *Application for exemption.* Traders must apply to the designated contract market or swap execution facility that is a trading facility for any exemption from its speculative position limit rules. In considering whether to grant such an application for exemption, a designated contract market or swap execution facility that is a trading facility should take into account whether the requested exemption is in accord with sound commercial practices and results in a position that does not exceed an amount that may be established and liquidated in an orderly fashion.

(6) *Pre-enactment and transition period swap positions.* Speculative position limits should not apply to positions acquired in good faith in any pre-enactment swap, or in any transition period swap, in either case as defined by § 150.1. *Provided, however,* that a designated contract market or swap execution facility that is a trading facility may allow a person to net such position with post-effective date commodity derivative contracts for the purpose of complying with any non-spot-month speculative position limit.

(7) *Pre-existing positions*—(i) *Pre-existing positions in a spot-month.* A designated contract market or swap execution facility that is a trading facility should require compliance with spot month speculative position limits for pre-existing positions in commodity derivative contracts other than pre-enactment and transition period swaps.

(ii) *Pre-existing positions in a non-spot-month.* A single-month or all-months-combined speculative position limit should not apply to any commodity derivative contract acquired in good faith prior to the effective date of such limit, *provided, however,* that such position should be attributed to the person if the person's position is increased after the effective date of such limit.

(8) *Aggregation.* Designated contract markets and swap execution facilities that are trading facilities must have aggregation rules that conform to § 150.4.

(9) *Additional acceptable practices.* Particularly in the spot month, a designated contract market or swap execution facility that is a trading facility may:

(i) Impose additional restrictions on a person with a long position in the spot month of a physical-delivery contract who stands for delivery, takes that delivery, then re-establishes a long position;

(ii) Establish limits on the amount of delivery instruments that a person may hold in a physical-delivery contract; and

(iii) Impose such other restrictions as it deems necessary to reduce the potential threat of market manipulation or congestion, to maintain orderly execution of transactions, or for such other purposes consist with its responsibilities.

(c) *Securities futures products.* For security futures products, position limitations and position accountability provisions are specified in § 41.25(a)(3) of this chapter.

■ 26. Revise § 150.6 to read as follows:

§ 150.6 Ongoing application of the Act and Commission regulations.

This part shall only be construed as having an effect on position limits set by the Commission or a designated contract market or swap execution facility. Nothing in this part shall be construed to affect any other provisions of the Act or Commission regulations including but not limited to those relating to manipulation, attempted manipulation, corners, squeezes, fraudulent or deceptive conduct or prohibited transactions.

■ 27. Add § 150.7 to read as follows:

§ 150.7 Requirements for anticipatory bona fide hedging position exemptions.

(a) *Statement.* Any person who wishes to avail himself of exemptions for unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated services contract payments or receipts, or anticipatory cross-commodity hedges under the provisions of paragraphs (3)(iii), (4)(i), (4)(iii), (4)(iv), or (5), respectively, of the definition of bona fide hedging position in § 150.1 shall file Form 704 with the Commission in advance of the date the person expects to exceed the position limits established under this part. Filings in conformity with the requirements of this section shall be effective ten days after submission, unless otherwise notified by the Commission.

(b) *Commission notification.* At any time, the Commission may, by notice to any person filing a Form 704, specify its determination as to what portion, if any, of the amounts described in such filing does not meet the requirements for bona fide hedging positions. In no case shall such person's anticipatory bona fide hedging positions exceed the levels specified in paragraph (f) of this section.

(c) *Call for additional information.* At any time, the Commission may request a person who has on file a Form 704 under paragraph (a) of this section to file specific additional or updated information with the Commission to support a determination that the Form 704 on file accurately reflects unsold anticipated production, unfilled anticipated requirements, anticipated royalties, or anticipated services contract payments or receipts.

(d) *Initial statement.* Initial Form 704 concerning the classification of positions as bona fide hedging pursuant to paragraphs (3)(iii), or (4)(i), (4)(iii), (4)(iv) or anticipatory cross-commodity hedges under paragraph (5) of the definition of bona fide hedging position in § 150.1 shall be filed with the Commission at least ten days in advance of the date that such positions would be in excess of limits then in effect pursuant to section 4a of the Act. Such statements shall set forth in detail for a specified operating period, not in excess of one year for an agricultural commodity, the person's anticipated activity, i.e., unfilled anticipated requirements, unsold anticipated production, anticipated royalties, or anticipated services contract payments or receipts, and explain the method of determination thereof, including, but not limited to, the following information:

(1) *Anticipated activity.* For each anticipated activity:

(i) The type of cash commodity underlying the anticipated activity;

(ii) The name of the actual cash commodity underlying the anticipated activity and the units in which the cash commodity is measured;

(iii) An indication of whether the cash commodity is the same commodity (grade and quality) that underlies a core referenced futures contract or whether a cross-hedge will be used and, if so, additional information for cross hedges specified in paragraph (d)(2) of this section;

(iv) Annual production, requirements, royalty receipts or service contract payments or receipts, in terms of futures equivalents, of such commodity for the three complete fiscal years preceding the current fiscal year;

(v) The specified time period for which the anticipatory hedge exemption is claimed;

(vi) Anticipated production, requirements, royalty receipts or service contract payments or receipts, in terms of futures equivalents, of such commodity for such specified time period, not in excess of one year for an agricultural commodity;

(vii) Fixed-price forward sales, inventory, and fixed-price forward purchases of such commodity, including any quantity in process of manufacture and finished goods and byproducts of manufacture or processing (in terms of such commodity);

(viii) Unsold anticipated production, unfilled anticipated requirements, unsold anticipated royalty receipts,, and anticipated service contract payments or receipts the risks of which have not been offset with cash positions, of such commodity for the specified time period, not in excess of one year for an agricultural commodity; and

(ix) The maximum number of long positions and short positions in referenced contracts expected to be used to offset the risks of such anticipated activity.

(2) *Additional information for cross hedges.* Cash positions that represent a commodity, or products or byproducts of a commodity, that is different from the commodity underlying a commodity derivative contract that is expected to be used for hedging, shall be shown both in terms of the equivalent amount of the commodity underlying the commodity derivative contract used for hedging and in terms of the actual cash commodity as provided for on Form 704. In computing their cash position, every person shall use such standards and conversion factors that are usual in the particular trade or that otherwise reflect the value-fluctuation-equivalents of the cash position in terms of the commodity underlying the commodity derivative contract used for hedging. Such person shall furnish to the Commission upon request detailed information concerning the basis for and derivation of such conversion factors, including:

(i) The hedge ratio used to convert the actual cash commodity to the equivalent amount of the commodity underlying the commodity derivative contract used for hedging; and

(ii) An explanation of the methodology used for determining the hedge ratio.

(e) *Supplemental reports.* Whenever the amount which a person wishes to consider as a bona fide hedging position shall exceed the amount in the most recent filing pursuant to this section or such lesser amount as determined by the Commission pursuant to paragraph (b) of this section, such person shall file with the Commission a Form 704 which updates the information provided in the person's most recent filing and supplies the reason for this change at least ten days in advance of the date that person wishes to exceed such amount.

(f) *Annual update.* Each person that has filed an initial statement on Form 704 for an anticipatory bona fide hedge exemption shall provide annual updates on the utilization of the anticipatory exemption. Each person shall report actual cash activity utilizing the anticipatory exemption for the preceding year, as well as the cumulative utilization since the filing of the initial or most recent supplemental statement. Each person shall also provide a good faith estimate of the remaining anticipatory exemption. Such reports shall set forth in detail the person's activity related to the anticipated exemption and shall include, but not be limited to the following information:

(1) *Information to be included:.* For each anticipated activity:

(i) The type of cash commodity underlying the anticipated activity;

(ii) The name of the actual cash commodity underlying the anticipated activity and the units in which the cash commodity is measured;

(iii) An indication of whether the cash commodity is the same commodity (grade and quality) that underlies a core referenced futures contract or whether a cross-hedge will be used and, if so, additional information for cross hedges specified in paragraph (d)(2) of this section;

(iv) Actual production, requirements, royalty receipts or service contract payments or receipts, in terms of futures equivalents, of such commodity for the reporting month;

(v) Cumulative actual production, requirements, royalty receipts or service contract payments or receipts, in terms of futures equivalents, of such commodity since the initial or supplemental statement;

(vi) Estimated anticipated production, requirements, royalty receipts or service contract payments or receipts, in terms of futures equivalents, of such commodity for the remainder of such specified time period, not in excess of one year for an agricultural commodity;

(vii) Fixed-price forward sales, inventory, and fixed-price forward purchases of such commodity, including any quantity in process of manufacture and finished goods and byproducts of manufacture or processing (in terms of such commodity) for the reporting month;

(viii) Remaining unsold anticipated production, unfilled anticipated requirements, unsold anticipated royalty receipts, and anticipated service contract payments or receipts the risks of which have not been offset with cash positions, of such commodity for the specified time period, not in excess of one year for an agricultural commodity; and

(ix) The maximum number of long positions and short positions in referenced contracts expected to be used to offset the risks of such anticipated activity for the remainder of the specified time period.

(2) Reserved.

(g) *Monthly reporting.* Monthly reporting of remaining anticipated hedge exemption shall be reported on Form 204, along with reporting other exemptions pursuant to § 19.01(a)(3)(vii).

(h) *Maximum sales and purchases.* Sales or purchases of commodity derivative contracts considered to be bona fide hedging positions under paragraphs (3)(iii)(A) or (4)(i) of the bona fide hedging position definition in § 150.1 shall at no time exceed the lesser of:

(1) A person's anticipated activity (including production, requirements, royalties and services) as described by the information most recently filed pursuant to this section that has not been offset with cash positions; or

(2) Such lesser amount as determined by the Commission pursuant to paragraph (b) of this section.

(i) *Delegation of authority to the Director of the Division of Market Oversight.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(i) In paragraph (b) of this section to provide notice to a person that some or all of the amounts described in a Form 704 filing does not meet the requirements for bona fide hedging positions;

(ii) In paragraph (c) of this section to request a person who has filed a Form 704 under paragraph (a) of this section to file specific additional or updated information with the Commission to support a determination that the Form 704 filed accurately reflects unsold anticipated production, unfilled anticipated requirements, anticipated royalties, or anticipated services contract payments or receipts; and

(iii) In paragraph (d)(2) of this section to request detailed information concerning the basis for and derivation of conversion factors used in computing the cash position provided in Form 704.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

■ 28. Add § 150.8 to read as follows:

§ 150.8 Severability.

If any provision of this part, or the application thereof to any person or circumstances, is held invalid, such invalidity shall not affect other provisions or application of such provision to other persons or circumstances which can be given effect without the invalid provision or application.

■ 29. Add appendix A to part 150 to read as follows:

Appendix A to Part 150—Guidance on Risk Management Exemptions for Commodity Derivative Contracts in Excluded Commodities

(1) This appendix provides non-exclusive interpretative guidance on risk management exemptions for commodity derivative contracts in excluded commodities permitted under the definition of bona fide hedging position in § 150.1. The rules of a designated contract market or swap execution facility that is a trading facility may recognize positions consistent with this guidance as bona fide hedging positions. The Commission recognizes that risk reducing positions in commodity derivative contracts in excluded commodities may not conform to the general definition of bona fide hedging positions applicable to commodity derivative contracts in physical commodities, as provided under section 4a(c)(2) of the Act, and may not conform to enumerated bona fide hedging positions applicable to commodity derivative contracts in physical commodities under the definition of bona fide hedging position in § 150.1.

This interpretative guidance for core principle 5 for designated contract markets, section 5(d)(5) of the Act, and core principle 6 for swap execution facilities that are trading facilities, section 5h(f)(6) of the Act, is illustrative only of the types of positions for which a trading facility may elect to provide a risk management exemption and is not intended to be used as a mandatory checklist. Other positions might also be included appropriately within a risk management exemption.

(2)(a) *No temporary substitute criterion.* Risk management positions in commodity derivative contracts in excluded commodities need not be expected to represent a substitute for a subsequent transaction or position in a physical marketing channel. There need not be any requirement to replace a commodity derivative contract with a cash market position in order to qualify for a risk management exemption.

(b) *Cross-commodity hedging is permitted.* Risks that are offset in commodity derivative contracts in excluded commodities need not arise from the same commodities underlying the commodity derivative contracts. For example, a trading facility may recognize a risk management exemption based on the net interest rate risk arising from a bank's balance sheet of loans and deposits that is offset using Treasury security futures contracts or short-term interest rate futures contracts.

(3) *Examples of risk management positions.* This section contains examples of risk management positions that may be economically appropriate to the reduction of risk in the operation of a commercial enterprise.

(a) *Balance sheet hedging.* A commercial enterprise may have risks arising from its net position in assets and liabilities.

(i) *Foreign currency translation.* Once form of balance sheet hedging involves offsetting net exposure to changes in currency exchange rates for the purpose of stabilizing the domestic dollar accounting value of net assets and/or liabilities which are denominated in a foreign currency. For example, a bank may make loans in a foreign currency and take deposits in that same foreign currency. Such a bank is exposed to net foreign currency translation risk when the amount of loans is not equal to the amount of deposits. A bank with a net long exposure to a foreign currency may hedge by establishing an offsetting short position in a foreign currency commodity derivative contract.

(ii) *Interest rate risk.* Another form of balance sheet hedging involves offsetting net exposure to changes in values of assets and liabilities of differing durations. Examples include:

(A) A pension fund may invest in short term securities and have longer term liabilities. Such a pension fund has a duration mismatch. Such a pension fund may hedge by establishing a long position in Treasury security futures contracts to lengthen the duration of its assets to match the duration of its liabilities. This is economically equivalent to using a long position in Treasury security futures contracts to shorten the duration of its liabilities to match the duration of its assets.

(B) A bank may make a certain amount of fixed-rate loans of one maturity and fund such assets through taking fixed-rate deposits of a shorter maturity. Such a bank is exposed to interest rate risk, in that an increase in interest rates may result in a greater decline in value of the assets than the decline in value of the deposit liabilities. A bank may hedge by establishing a short position in short-term interest rate futures contracts to lengthen the duration of its liabilities to match the duration of its assets. This is economically equivalent to using a short position in short-term interest rate futures contracts, for example, to shorten the duration of its assets to match the duration of its liabilities.

(b) *Unleveraged synthetic positions.* An investment fund may have risks arising from a delayed investment in an asset allocation promised to investors. Such a fund may synthetically gain exposure to an asset class using a risk management strategy of establishing a long position in commodity derivative contracts that does not exceed cash set aside in an identifiable manner, including short-term investments, any funds deposited as margin and accrued profits on such commodity derivative contract positions. For example:

(i) A collective investment fund that invests funds in stocks pursuant to an asset allocation strategy may obtain immediate stock market exposure upon receipt of new monies by establishing a long position in stock index futures contracts (''equitizing cash''). Such a long position may qualify as a risk management exemption under trading facility rules provided such long position does not exceed the cash set aside. The long position in stock index futures contracts need not be converted to a position in stock.

(ii) Upon receipt of new funds from investors, an insurance company that invests in bond holdings for a separate account wishes to lengthen synthetically the duration of the portfolio by establishing a long position in Treasury futures contracts. Such a long position may qualify as a risk management exemption under trading facility rules provided such long position does not exceed the cash set aside. The long position in Treasury futures contracts need not be converted to a position in bonds.

(c) *Temporary asset allocations.* A commercial enterprise may have risks arising from potential transactional costs in temporary asset allocations (altering portfolio exposure to certain asset classes such as equity securities and debt securities). Such an enterprise may hedge existing assets owned by establishing a short position in an appropriate commodity derivative contract and synthetically gain exposure to an alternative asset class using a risk management strategy of establishing a long position in another commodity derivative contract that does not exceed: the value of the existing asset at the time the temporary asset allocation is established or, in the alternative, the hedged value of the existing asset plus any accrued profits on such risk management positions. For example:

(i) A collective investment fund that invests funds in bonds and stocks pursuant to an asset allocation strategy may believe that market considerations favor a temporary increase in the fund's equity exposure relative to its bond holdings. The fund manager may choose to accomplish the reallocation using commodity derivative contracts, such as a short position in Treasury security futures contracts and a long position in stock index futures contracts. The short position in Treasury security futures contracts may qualify as a hedge of interest rate risk arising from the bond holdings. A trading facility may adopt rules to recognize as a risk management exemption such a long position in stock index futures.

(ii) Reserved.

(4) *Clarification of bona fides of short positions.*

(a) *Calls sold.* A seller of a call option establishes a short call option. A short call option is a short position in a commodity derivative contract with respect to the underlying commodity. A bona fide hedging position includes such a written call option that does not exceed in quantity the ownership or fixed-price purchase contracts in the contract's underlying cash commodity by the same person.

(b) *Puts purchased and portfolio insurance.* A buyer of a put option establishes a long put option. However, a long put option is a short position in a commodity derivative contract with respect to the underlying commodity. A bona fide hedging position includes such an owned put that does not exceed in quantity the ownership or fixed-price purchase contracts in the contract's underlying cash commodity by the same person.

The Commission also recognizes as bona fide hedging positions strategies that provide protection against a price decline equivalent to an owned position in a put option for an existing portfolio of securities owned. A dynamically managed short position in a futures contract may replicate the characteristics of a long position in a put option. Hedgers are reminded of their obligation to enter and exit the market in an orderly manner.

(c) *Synthetic short futures contracts.* A person may establish a synthetic short futures position by purchasing a put option and selling a call option, when each option has the same notional amount, strike price, expiration date and underlying commodity. Such a synthetic short futures position is a short position in a commodity derivative contract with respect to the underlying commodity. A bona fide hedging position includes such a synthetic short futures position that does not exceed in quantity the ownership or fixed-price purchase contracts in the contract's underlying cash commodity by the same person.

■ 30. Add appendix B to part 150 to read as follows:

Appendix B to Part 150—Commodities Listed as Substantially the Same for Purposes of the Definition of Basis Contract

The following table lists core referenced futures contracts and commodities that are treated as substantially the same as a commodity underlying a core referenced futures contract for purposes of the definition of basis contract in § 150.1.

BASIS CONTRACT LIST OF SUBSTANTIALLY THE SAME COMMODITIES

Core referenced futures contract	Commodities considered substantially the same (regardless of location)	Source(s) for specification of quality
NYMEX Light Sweet Crude Oil futures contract (CL).		
	1. Light Louisiana Sweet (LLS) Crude Oil	NYMEX Argus LLS vs. WTI (Argus) Trade Month futures contract (E5).
		NYMEX LLS (Argus) vs. WTI Financial futures contract (WJ).
		ICE Futures Europe Crude Diff—Argus LLS vs WTI 1st Line Swap futures contract (ARK).
		ICE Futures Europe Crude Diff—Argus LLS vs WTI Trade Month Swap futures contract (ARL).
NYMEX New York Harbor ULSD Heating Oil futures contract (HO).		
	1. Chicago ULSD	NYMEX Chicago ULSD (Platts) vs. NY Harbor ULSD Heating Oil futures contract (5C).
	2. Gulf Coast ULSD	NYMEX Group Three ULSD (Platts) vs. NY Harbor ULSD Heating Oil futures contract (A6).
		NYMEX Gulf Coast ULSD (Argus) Up-Down futures contract (US).
		NYMEX Gulf Coast ULSD (Argus) Up-Down BALMO futures contract (GUD).
		NYMEX Gulf Coast ULSD (Platts) Up-Down BALMO futures contract (1L).
		NYMEX Gulf Coast ULSD (Platts) Up-Down Spread futures contract (LT).
		ICE Futures Europe Diesel Diff- Gulf Coast vs Heating Oil 1st Line Swap futures contract (GOH).
		CME Clearing Europe Gulf Coast ULSD(Platts) vs. New York Heating Oil (NYMEX) Spread Calendar swap (ELT).
		CME Clearing Europe New York Heating Oil (NYMEX) vs. European Gasoil (IC) Spread Calendar swap (EHA).
	3. California Air Resources Board Spec ULSD (CARB no. 2 oil).	NYMEX Los Angeles CARB Diesel (OPIS) vs. NY Harbor ULSD Heating Oil futures contract (KL).
	4. Gas Oil Deliverable in Antwerp, Rotterdam, or Amsterdam Area.	ICE Futures Europe Gasoil futures contract (G).
		ICE Futures Europe Heating Oil Arb—Heating Oil 1st Line vs. Gasoil 1st Line Swap futures contract (HOT).
		ICE Futures Europe Heating Oil Arb—Heating Oil 1st Line vs. Low Sulphur Gasoil 1st Line Swap futures contract (ULL).
		NYMEX NY Harbor ULSD Heating Oil vs. Gasoil futures contract (HA).
NYMEX RBOB Gasoline futures contract (RB).		
	1. Chicago Unleaded 87 gasoline	NYMEX Chicago Unleaded Gasoline (Platts) vs. RBOB Gasoline futures contract (3C).
		NYMEX Group Three Unleaded Gasoline (Platts) vs. RBOB Gasoline futures contract (A8).
	2. Gulf Coast Conventional Blendstock for Oxygenated Blending (CBOB) 87.	NYMEX Gulf Coast CBOB Gasoline A1 (Platts) vs. RBOB Gasoline futures contract (CBA).
		NYMEX Gulf Coast Unl 87 (Argus) Up-Down futures contract (UZ).
	3. Gulf Coast CBOB 87 (Summer Assessment)	

BASIS CONTRACT LIST OF SUBSTANTIALLY THE SAME COMMODITIES—Continued

Core referenced futures contract	Commodities considered substantially the same (regardless of location)	Source(s) for specification of quality
	4. Gulf Coast Unleaded 87 (Summer Assessment)	NYMEX Gulf Coast CBOB Gasoline A2 (Platts) vs. RBOB Gasoline futures contract (CRB). NYMEX Gulf Coast 87 Gasoline M2 (Platts) vs. RBOB Gasoline futures contract (RVG). NYMEX Gulf Coast 87 Gasoline M2 (Platts) vs. RBOB Gasoline BALMO futures contract (GBB). NYMEX Gulf Coast 87 Gasoline M2 (Argus) vs. RBOB Gasoline BALMO futures contract (RBG).
	5. Gulf Coast Unleaded 87	NYMEX Gulf Coast Unl 87 (Platts) Up-Down BALMO futures contract (1K). NYMEX Gulf Coast Unl 87 Gasoline M1 (Platts) vs. RBOB Gasoline futures contract (RV). CME Clearing Europe Gulf Coast Unleaded 87 Gasoline M1 (Platts) vs. New York RBOB Gasoline (NYMEX) Spread Calendar swap (ERV).
	6. Los Angeles California Reformulated Blendstock for Oxygenate Blending (CARBOB) Regular.	NYMEX Los Angeles CARBOB Gasoline (OPIS) vs. RBOB Gasoline futures contract (JL).
	7. Los Angeles California Reformulated Blendstock for Oxygenate Blending (CARBOB) Premium.	NYMEX Los Angeles CARBOB Gasoline (OPIS) vs. RBOB Gasoline futures contract (JL).
	8. Euro-BOB OXY NWE Barges	NYMEX RBOB Gasoline vs. Euro-bob Oxy NWE Barges (Argus) (1000mt) futures contract (EXR). CME Clearing Europe New York RBOB Gasoline (NYMEX) vs. European Gasoline Euro-bob Oxy Barges NWE (Argus) (1000mt) Spread Calendar swap (EEXR).
	9. Euro-BOB OXY FOB Rotterdam	ICE Futures Europe Gasoline Diff—RBOB Gasoline 1st Line vs. Argus Euro-BOB OXY FOB Rotterdam Barge Swap futures contract (ROE).

■ 31. Add appendix C to part 150 to read as follows:

Appendix C to Part 150—Examples of Bona Fide Hedging Positions for Physical Commodities

A non-exhaustive list of examples meeting the definition of bona fide hedging position under § 150.1 is presented below. With respect to a position that does not fall within an example in this appendix, a person seeking to rely on a bona fide hedging position exemption under § 150.3 may seek guidance from the Division of Market Oversight. References to paragraphs in the examples below are to the definition of bona fide hedging position in § 150.1.

1. Portfolio Hedge Under Paragraph (3)(i) of the Bona Fide Hedging Position Definition

Fact Pattern: It is currently January and Participant A owns seven million bushels of corn located in its warehouses. Participant A has entered into fixed-price forward sale contracts with several processors for a total of five million bushels of corn that will be delivered by May of this year. Participant A has no fixed-price corn purchase contracts. Participant A's gross long cash position is equal to seven million bushels of corn. Because Participant A has sold forward five million bushels of corn, its net cash position is equal to long two million bushels of corn. To reduce price risk associated with potentially lower corn prices, Participant A chooses to establish a short position of 400 contracts in the CBOT Corn futures contract, equivalent to two million bushels of corn, in the same crop year as the inventory.

Analysis: The short position in a contract month in the current crop year for the CBOT Corn futures contract, equivalent to the amount of inventory held, satisfies the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and the provisions associated with owning a commodity under paragraph (3)(i).[1] Because the firm's net cash position is two million bushels of unsold corn, the firm is exposed to price risk. Participant A's hedge of the two million bushels represents a substitute for a fixed-price forward sale at a later time in the physical marketing channel. The position is economically appropriate to the reduction of price risk because the short position in a referenced contract does not exceed the quantity equivalent risk exposure (on a net basis) in the cash commodity in the current crop year. Last, the hedge arises from a potential change in the value of corn owned by Participant A.

2. Lending a Commodity and Hedge of Price Risk Under Paragraph (3)(i) of the Bona Fide Hedging Position Definition

Fact Pattern: Bank B owns 1,000 ounces of gold that it lends to Jewelry Fabricator J at LIBOR plus a differential. Under the terms of the loan, Jewelry Fabricator J may later purchase the gold from Bank B at a differential to the prevailing price of the Commodity Exchange, Inc. (COMEX) Gold futures contract (*i.e.,* an open-price purchase agreement is embedded in the terms of the loan). Jewelry Fabricator J intends to use the gold to make jewelry and reimburse Bank B for the loan using the proceeds from jewelry sales and either purchase gold from Bank B by paying the market price for gold or return the equivalent amount of gold to Bank B by purchasing gold at the market price. Because Bank B has retained the price risk on gold, the bank is concerned about its potential loss if the price of gold drops. The bank reduces the risk of a potential loss in the value of the gold by establishing a ten contract short

[1] Participant A could also choose to hedge on a gross basis. In that event, Participant A could establish a short position in the March Chicago Board of Trade Corn futures contract equivalent to seven million bushels of corn to offset the price risk of its inventory and establish a long position in the May Chicago Board of Trade Corn futures contract equivalent to five million bushels of corn to offset the price risk of its fixed-price forward sale contracts.

position in the COMEX Gold futures contract, which has a unit of trading of 100 ounces of gold. The ten contract short position is equivalent to 1,000 ounces of gold.

Analysis: This position meets the general requirements for bona fide hedging positions under paragraphs (2)(i)(A)–(C) and the requirements associated with owning a cash commodity under paragraph (3)(i). The physical commodity that is being hedged is the underlying cash commodity for the COMEX Gold futures contract. Bank B's short hedge of the gold represents a substitute for a transaction to be made in the physical marketing channel (*e.g.,* completion of the open-price sale to Jewelry Fabricator J). Because the notional quantity of the short position in the gold futures contract is equal to the amount of gold that Bank B owns, the hedge is economically appropriate to the reduction of risk. Finally, the short position in the commodity derivative contract offsets the potential change in the value of the gold owned by Bank B.

3. Repurchase Agreements and Hedge of Inventory Under Paragraph (3)(i) of the Bona Fide Hedging Position Definition

Fact Pattern: Elevator A purchased 500,000 bushels of wheat in April and reduced its price risk by establishing a short position of 100 contracts in the CBOT Wheat futures contract, equivalent to 500,000 bushels of wheat. Because the price of wheat rose steadily since April, Elevator A had to make substantial maintenance margin payments. To alleviate its cash flow concern about meeting further margin calls, Elevator A decides to enter into a repurchase agreement with Bank B and offset its short position in the wheat futures contract. The repurchase agreement involves two separate contracts: A fixed-price sale from Elevator A to Bank B at today's spot price; and an open-price purchase agreement that will allow Elevator A to repurchase the wheat from Bank B at the prevailing spot price three months from now. Because Bank B obtains title to the wheat under the fixed-price purchase agreement, it is exposed to price risk should the price of wheat drop. Bank B establishes a short position of 100 contracts in the CBOT Wheat futures contract, equivalent to 500,000 bushels of wheat.

Analysis: Bank B's position meets the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and the provisions for owning the cash commodity under paragraph (3)(i). The short position in referenced contracts by Bank B is a substitute for a fixed-price sales transaction to be taken at a later time in the physical marketing channel either to Elevator A or to another commercial party. The position is economically appropriate to the reduction of risk in the conduct and management of the commercial enterprise (Bank B) because the notional quantity of the short position in referenced contracts held by Bank B is not larger than the quantity of cash wheat purchased by Bank B. Finally, the short position in the CBOT Wheat futures contract reduces the price risk associated with owning cash wheat.

4. Utility Hedge of Anticipated Customer Requirements Under Paragraph (3)(iii)(B) of the Bona Fide Hedging Position Definition

Fact Pattern: Natural Gas Utility A is encouraged to hedge its purchases of natural gas by the State Public Utility Commission in order to reduce natural gas price risk to residential customers. State Public Utility Commission considers the hedging practice to be prudent and allows gains and losses from hedging to be passed on to Natural Gas Utility A's regulated natural gas customers. Natural Gas Utility A has about one million residential customers who have average historical usage of about 71.5 mmBTUs of natural gas per year per residence. The utility decides to hedge about 70 percent of its residential customers' anticipated requirements for the following year, equivalent to a 5,000 contract long position in the NYMEX Henry Hub Natural Gas futures contract. To reduce the risk of higher prices to residential customers, Natural Gas Utility A establishes a 5,000 contract long position in the NYMEX Henry Hub Natural Gas futures contract. Since the utility is only hedging 70 percent of historical usage, Natural Gas Utility A is highly certain that realized demand will exceed its hedged anticipated residential customer requirements.

Analysis: Natural Gas Utility A's position meets the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and the provisions for hedges of unfilled anticipated requirements by a utility under paragraph (3)(iii)(B). The physical commodity that is being hedged involves a commodity underlying the NYMEX Henry Hub Natural Gas futures contract. The long position in the commodity derivative contract represents a substitute for transactions to be taken at a later time in the physical marketing channel. The position is economically appropriate to the reduction of price risk because the price of natural gas may increase. The commodity derivative contract position offsets the price risk of natural gas that the utility anticipates purchasing on behalf of its residential customers. As provided under paragraph (3)(iii), the risk-reducing position qualifies as a bona fide hedging position in the natural gas physical-delivery referenced contract during the spot month provided that the position does not exceed the unfilled anticipated requirements for that month and for the next succeeding month.

5. Processor Margins Hedge Using Unfilled Anticipated Requirements Under Paragraph (3)(iii)(A) of the Bona Fide Hedging Position Definition and Anticipated Production Under Paragraph (4)(i) of the Definition

Fact Pattern: Soybean Processor A has a total throughput capacity of 200 million bushels of soybeans per year (equivalent to 40,000 CBOT soybean futures contracts). Soybean Processor A crushes soybeans into products (soybean oil and soybean meal). It currently has 40 million bushels of soybeans in storage and has offset that risk through fixed-price forward sales of the amount of products expected to be produced from crushing 40 million bushels of soybeans, thus locking in its processor margin on one million metric tons of soybeans. Because it has consistently operated its plants at full capacity over the last three years, it anticipates purchasing another 160 million bushels of soybeans to be delivered to its storage facility over the next year. It has not sold the 160 million bushels of anticipated production of crushed products forward. Processor A faces the risk that the difference in price relationships between soybeans and the crushed products (*i.e.,* the crush spread) could change adversely, resulting in reduced anticipated processing margins. To hedge its processing margins and lock in the crush spread, Processor A establishes a long position of 32,000 contracts in the CBOT Soybean futures contract (equivalent to 160 million bushels of soybeans) and corresponding short positions in CBOT Soybean Meal and Soybean Oil futures contracts, such that the total notional quantity of soybean meal and soybean meal futures contracts are equivalent to the expected production from crushing 160 million bushels of soybeans into soybean meal and soybean oil.

Analysis: These positions meet the general requirements for bona fide hedging positions under paragraphs (2)(i)(A)–(C) and the provisions for hedges of unfilled anticipated requirements under paragraph (3)(iii)(A) and unsold anticipated production under paragraph (4)(i). The physical commodities being hedged are commodities underlying the CBOT Soybean, Soybean Meal, and Soybean Oil futures contracts. Long positions in the soybean futures contract and corresponding short positions in soybean meal and soybean oil futures contracts qualify as bona fide hedging positions provided they do not exceed the unfilled anticipated requirements of the cash commodity for twelve months (in this case 4 million tons) as required in paragraph (3)(iii)(A) and the quantity equivalent of twelve months unsold anticipated production of cash products and by-products as required in paragraph (4)(i). Such positions are a substitute for purchases and sales to be made at a later time in the physical marketing channel and are economically appropriate to the reduction of risk. The positions in referenced contracts offset the potential change in the value of soybeans that the processor anticipates purchasing and the potential change in the value of products and by-products the processor anticipates producing and selling. The size of the permissible long hedge position in the soybean futures contract must be reduced by any inventories and fixed-price purchases because they would reduce the processor's *unfilled* requirements. Similarly, the size of the permissible short hedge positions in soybean meal and soybean oil futures contracts must be reduced by any fixed-price sales because they would reduce the processor's *unsold* anticipated production. As provided under paragraph (3)(iii)(A), the risk reducing long position in the soybean futures contract that is not in excess of the anticipated requirements for soybeans for that month and the next succeeding month qualifies as a bona fide hedging position during the last five days of trading in the physical-delivery referenced contract. As provided under paragraph (4)(i), the risk reducing short position in the soybean meal and oil futures contract do not qualify as a bona fide hedging position in a physical-delivery referenced contract during the last five days of trading in the event the Soybean Processor A does not have unsold products in inventory.

The combination of the long and short positions in soybean, soybean meal, and soybean oil futures contracts are economically appropriate to the reduction of risk. However, unlike in this example, an unpaired position (*e.g.,* only a long position in a commodity derivative contract) that is *not* offset by either a cash market position (*e.g.,* a fixed-price sales contract) or derivative position (*e.g.,* a short position in a commodity derivative contract) would not represent an economically appropriate reduction of risk. This is because the commercial enterprise's crush spread risk is relatively low in comparison to the price risk from taking an outright long position in the futures contract in the underlying commodity or an outright short position in the futures contracts in the products and by-products of processing. The price fluctuations of the crush spread, that is, the risk faced by the commercial enterprise, would not be expected to be substantially related to the price fluctuations of either an outright long or outright short futures position.

6. Agent Hedge Under Paragraph (3)(iv) of the Bona Fide Hedging Position Definition

Fact Pattern: Agent A is in the business of merchandising (selling) the cash grain owned by multiple warehouse operators and forwarding the merchandising revenues back to the warehouse operators less the agent's fees. Agent A does not own any cash commodity, but is responsible for merchandising of the cash grain positions of the warehouse operators pursuant to contractual arrangements. The contractual arrangements also authorize Agent A to hedge the price risks of the grain owned by the warehouse operators. For the volumes of grain it is authorized to hedge, the agent enters into short positions in grain commodity derivative contracts that offset the price risks of the cash commodities.

Analysis: The positions meet the requirements of paragraphs (2)(1)(A)–(C) for hedges of a physical commodity and paragraph (3)(iv) for hedges by an agent. The positions represent a substitute for transactions to be made in the physical marketing channel, are economically appropriate to the reduction of risks arising from grain owned by the agent's contractual counterparties, and arise from the potential change in the value of such grain. The agent does not own and has not contacted to purchase such grain at a fixed price, but is responsible for merchandising the cash positions that are being offset in commodity derivative contracts. The agent has a contractual arrangement with the persons who own the grain being offset.

7. Sovereign Hedge of Unsold Anticipated Production Under Paragraph (4)(i) of the Bona Fide Hedging Position Definition and Position Aggregation Under § 150.4

Fact Pattern: A Sovereign induces a farmer to sell his anticipated production of 100,000 bushels of corn forward to User A at a fixed price for delivery during the expected harvest. In return for the farmer entering into the fixed-price forward sale, the Sovereign agrees to pay the farmer the difference between the market price at the time of harvest and the price of the fixed-price forward, in the event that the market price at the time of harvest is above the price of the forward. The fixed-price forward sale of 100,000 bushels of corn reduces the farmer's downside price risk associated with his anticipated agricultural production. The Sovereign faces commodity price risk as it stands ready to pay the farmer the difference between the market price and the price of the fixed-price contract. To reduce that risk, the Sovereign establishes a long position of 20 call options on the Chicago Board of Trade (CBOT) Corn futures contract, equivalent to 100,000 bushels of corn.

Analysis: Because the Sovereign and the farmer are acting together pursuant to an express agreement, the aggregation provisions of § 150.4 apply and they are treated as a single person for purposes of position limits. Taking the positions of the Sovereign and farmer jointly, the risk profile of the combination of the forward sale and the long call is approximately equivalent to the risk profile of a synthetic long put.[2] A synthetic long put offsets the downside price risk of anticipated production. Thus, the position of that person satisfies the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and meets the requirements for anticipated agricultural production under paragraph (4)(i). The agreement between the Sovereign and the farmer involves the production of a commodity underlying the CBOT Corn futures contract. The synthetic long put is a substitute for transactions that the farmer has made in the physical marketing channel. The synthetic long put reduces the price risk associated with anticipated agricultural production. The size of the Sovereign's position is equivalent to the size of the farmer's anticipated production. As provided under paragraph (4), the Sovereign's risk-reducing position would not qualify as a bona fide hedging position in a physical-delivery futures contract during the last five days of trading; however, since the CBOT Corn option will exercise into a physical-delivery CBOT Corn futures contract prior to the last five days of trading in that physical-delivery futures contract, the Sovereign may continue to hold its option position as a bona fide hedging position through option expiry.

8. Hedge of Offsetting Unfixed Price Sales and Purchases Under Paragraph (4)(ii) of the Bona Fide Hedging Position Definition

Fact Pattern: Currently it is October and Oil Merchandiser A has entered into cash forward contracts to purchase 600,000 of crude oil at a floating price that references the January contract month (in the next calendar year) for the ICE Futures Brent Crude futures contract and to sell 600,000 barrels of crude oil at a price that references the February contract month (in the next calendar year) for the NYMEX Light Sweet Crude Oil futures contract. Oil Merchandiser A is concerned about an adverse change in the price spread between the January ICE Futures Brent Crude futures contract and the February NYMEX Light Sweet Crude Oil futures contract. To reduce that risk, Oil Merchandiser A establishes a long position of 600 contracts in the January ICE Futures Brent Crude futures contract, price risk equivalent to buying 600,000 barrels of oil, and a short position of 600 contracts in the February NYMEX Light Sweet Crude Oil futures contract, price risk equivalent to selling 600,000 barrels of oil.

Analysis: Oil Merchandiser A's positions meet the general requirements for bona fide hedging positions under paragraphs (2)(i)(A)–(C) and the provisions for offsetting sales and purchases in referenced contracts under paragraph (4)(ii). The physical commodity that is being hedged involves a commodity underlying the NYMEX Light Sweet Crude Oil futures contract. The long and short positions in commodity derivative contracts represent substitutes for transactions to be taken at a later time in the physical marketing channel. The positions are economically appropriate to the reduction of risk because the price spread between the ICE Futures Brent Crude futures contract and the NYMEX Light Sweet Crude Oil futures contract could move adversely to Oil Merchandiser A's interests in the two cash forward contracts, that is, the price of the ICE Futures Brent Crude futures contract could increase relative to the price of the NYMEX Light Sweet Crude Oil futures contract. The positions in commodity derivative contracts offset the price risk in the cash forward contracts. As provided under paragraph (4), the risk-reducing position does not qualify as a bona fide hedging position in the crude oil physical-delivery referenced contract during the spot month.

9. Anticipated Royalties Hedge Under Paragraph (4)(iii) of the Bona Fide Hedging Position Definition and Pass-Through Swaps Hedge Under Paragraph (2)(ii) of the Definition

a. *Fact Pattern:* In order to develop an oil field, Company A approaches Bank B for financing. To facilitate the loan, Bank B first establishes an independent legal entity commonly known as a special purpose vehicle (SPV). Bank B then provides a loan to the SPV. The SPV is obligated to repay principal and interest to the Bank based on a fixed price for crude oil. The SPV in turn makes a production loan to Company A. The terms of the production loan require Company A to provide the SPV with volumetric production payments (VPPs) based on a specified share of the production to be sold at the prevailing price of crude oil (*i.e.,* the index price) as oil is produced. Because the price of crude oil may fall, the SPV reduces that risk by entering into a

[2] Put-call parity describes the mathematical relationship between price of a put and call with identical strike prices and expiry.

crude oil swap with Swap Dealer C. The swap requires the SPV to pay Swap Dealer C the floating price of crude oil (*i.e.,* the index price) and for Swap Dealer C to pay a fixed price to the SPV. The notional quantity for the swap is equal to the expected production underlying the VPPs to the SPV. The SPV will receive a floating price at index on the VPP and will pay a floating price at index on the swap, which will offset. The SPV will receive a fixed price payment on the swap and repay the loan's principal and interest to Bank B. The SPV is highly certain that the VPP production volume will occur, since the SPV's engineer has reviewed the forecasted production from Company A and required the VPP volume to be set with a cushion (*i.e.,* a hair-cut) below the forecasted production.

Analysis: For the SPV, the swap between Swap Dealer C and the SPV meets the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and the requirements for anticipated royalties under paragraph (4)(iii). The SPV will receive payments under the VPP royalty contract based on the unfixed price sale of anticipated production of the physical commodity underlying the royalty contract, *i.e.,* crude oil. The swap represents a substitute for the price of sales transactions to be made in the physical marketing channel. The SPV's swap position qualifies as a hedge because it is economically appropriate to the reduction of price risk. The swap reduces the price risk associated with a change in value of a royalty asset. The fluctuations in value of the SPV's anticipated royalties are substantially related to the fluctuations in value of the crude oil swap with Swap Dealer C.

b. *Continuation of Fact Pattern:* Swap Dealer C offsets the price risk associated with the swap to the SPV by establishing a short position in cash-settled crude oil futures contracts. The notional quantity of the short position in futures contracts held by Swap Dealer C exactly matches the notional quantity of the swap with the SPV.

Analysis: For the swap dealer, because the SPV enters the cash-settled swap as a bona fide hedger under paragraph (4)(iii) (*i.e.,* a pass-through swap counterparty), the offset of the risk of the swap in a futures contract by Swap Dealer C qualifies as a bona fide hedging position (*i.e.,* a pass-through swap offset) under paragraph (2)(ii)(A). Since the swap was executed opposite a pass-through swap counterparty and was offset, the swap itself also qualifies as a bona fide hedging position (*i.e.,* a pass-through swap) under paragraph (2)(ii)(B). If the cash-settled swap is not a referenced contract, then the pass-through swap offset may qualify as a cross-commodity hedge under paragraph (5), provided the fluctuations in value of the pass-through swap offset are substantially related to the fluctuations in value of the pass-through swap.

10. Anticipated Royalties Hedge Under Paragraph (4)(iii) of the Bona Fide Hedging Position Definition and Cross-Commodity Hedge Under Paragraph (5) of the Definition

Fact Pattern: An eligible contract participant (ECP) owns royalty interests in a portfolio of oil wells. Royalties are paid at the prevailing (floating) market price for the commodities produced and sold at major trading hubs, less transportation and gathering charges. The large portfolio and well-established production history for most of the oil wells provide a highly certain production stream for the next 24 months. The ECP also determined that changes in the cash market prices of 50 percent of the oil production underlying the portfolio of royalty interests historically have been closely correlated with changes in the calendar month average of daily settlement prices of the nearby NYMEX Light Sweet Crude Oil futures contract. The ECP decided to hedge some of the royalty price risk by entering into a cash-settled swap with a term of 24 months. Under terms of the swap, the ECP will receive a fixed payment and make monthly payments based on the calendar month average of daily settlement prices of the nearby NYMEX Light Sweet Crude Oil futures contract and notional amounts equal to 50 percent of the expected production volume of oil underlying the royalties.

Analysis: This position meets the requirements of paragraphs (2)(i)(A)–(C) for hedges of a physical commodity, paragraph (4)(iii) for hedges of anticipated royalties, and paragraph (5) for cross-commodity hedges. The long position in the commodity derivative contract represents a substitute for transactions to be taken at a later time in the physical marketing channel. The position is economically appropriate to the reduction of price risk because the price of oil may decrease. The commodity derivative contract position offsets the price risk of royalty payments, based on oil production, that the ECP anticipates receiving. The ECP is exposed to price risk arising from the anticipated production volume of oil attributable to her royalty interests. The physical commodity underlying the royalty portfolio that is being hedged involves a commodity with fluctuations in value that are substantially related to the fluctuations in value of the swap.

11. Hedges of Services Under Paragraph (4)(iv) of the Bona Fide Hedging Position Definition

a. *Fact Pattern:* Company A enters into a risk service agreement to drill an oil well with Company B. The risk service agreement provides that a portion of the revenue receipts to Company A depends on the value of the light sweet crude oil produced. Company A is exposed to the risk that the price of oil may fall, resulting in lower anticipated revenues from the risk service agreement. To reduce that risk, Company A establishes a short position in the New York Mercantile Exchange (NYMEX) Light Sweet Crude Oil futures contract, in a notional amount equivalent to the firm's anticipated share of the expected quantity of oil to be produced. Company A is highly certain of its anticipated share of the expected quantity of oil to be produced.

Analysis: Company A's hedge of a portion of its revenue stream from the risk service agreement meets the general requirements for bona fide hedging positions under paragraphs (2)(i)(A)–(C) and the provisions for services under paragraph (4)(iv). The contract for services involves the production of a commodity underlying the NYMEX Light Sweet Crude Oil futures contract. A short position in the NYMEX Light Sweet Crude Oil futures contract is a substitute for transactions to be taken at a later time in the physical marketing channel, with the value of the revenue receipts to Company A dependent on the price of the oil sales in the physical marketing channel. The short position in the futures contract held by Company A is economically appropriate to the reduction of risk, because the total notional quantity underlying the short position in the futures contract held by Company A is equivalent to its share of the expected quantity of future production under the risk service agreement. Because the price of oil may fall, the short position in the futures contract reduces price risk from a potential reduction in the payments to Company A under the service contract with Company B. Under paragraph (4)(iv), the risk-reducing position will not qualify as a bona fide hedging position during the spot month of the physical-delivery oil futures contract.

b. *Fact Pattern:* A City contracts with Firm A to provide waste management services. The contract requires that the trucks used to transport the solid waste use natural gas as a power source. According to the contract, the City will pay for the cost of the natural gas used to transport the solid waste by Firm A. In the event that natural gas prices rise, the City's waste transport expenses will increase. To mitigate this risk, the City establishes a long position in the NYMEX Henry Hub Natural Gas futures contract in an amount equivalent to the expected volume of natural gas to be used over the life of the service contract.

Analysis: This position meets the general requirements for bona fide hedging positions under paragraphs (2)(i)(A)–(C) and the provisions for services under paragraph (4)(iv). The contract for services involves the use of a commodity underlying the NYMEX Henry Hub Natural Gas futures contract. Because the City is responsible for paying the cash price for the natural gas used under the services contract, the long hedge is a substitute for transactions to be taken at a later time in the physical marketing channel. The position is economically appropriate to the reduction of price risk because the total notional quantity of the long position in a commodity derivative contract equals the expected volume of natural gas to be used over the life of the contract. The position in the commodity derivative contract reduces the price risk associated with an increase in anticipated costs that the City may incur under the services contract in the event that the price of natural gas increases. As provided under paragraph (4), the risk reducing position will not qualify as a bona fide hedge during the spot month of the physical-delivery futures contract.

12. Cross-Commodity Hedge Under Paragraph (5) of the Bona Fide Hedging Position Definition and Inventory Hedge Under Paragraph (3)(i) of the Definition

Fact Pattern: Copper Wire Fabricator A is concerned about possible reductions in the price of copper. Currently it is November and it owns inventory of 100 million pounds of copper and five million pounds of finished copper wire. Currently, deferred futures prices are lower than the nearby futures price. Copper Wire Fabricator A expects to sell 150 million pounds of finished copper wire in February of the following year. To reduce its price risk, Copper Wire Fabricator A establishes a short position of 6000 contracts in the February COMEX Copper futures contract, equivalent to selling 150 million pounds of copper. The fluctuations in value of copper wire are expected to be substantially related to fluctuations in value of copper.

Analysis: The Copper Wire Fabricator A's position meets the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and the provisions for owning a commodity under paragraph (3)(i) and for a cross-hedge of the finished copper wire under paragraph (5). The short position in a referenced contract represents a substitute for transactions to be taken at a later time in the physical marketing channel. The short position is economically appropriate to the reduction of price risk in the conduct and management of the commercial enterprise because the price of copper could drop. The short position in the referenced contract offsets the risk of a possible reduction in the value of the inventory that it owns. Since the finished copper wire is a product of copper that is not deliverable on the commodity derivative contract, 200 contracts of the short position are a cross-commodity hedge of the finished copper wire and 400 contracts of the short position are a hedge of the copper inventory.

13. Cross-Commodity Hedge Under Paragraph (5) of the Bona Fide Hedging Position Definition and Anticipated Requirements Hedge Under Paragraph (3)(iii)(A) of the Definition

Fact Pattern: Airline A anticipates using a predictable volume of jet fuel every month based on scheduled flights and decides to hedge 80 percent of that volume for each of the next 12 months. After a review of various commodity derivative contract hedging strategies, Airline A decides to cross hedge its anticipated jet fuel requirements in ultra-low sulfur diesel (ULSD) commodity derivative contracts. Airline A determined that price fluctuations in its average cost for jet fuel were substantially related to the price fluctuations of the calendar month average of the first nearby physical-delivery NYMEX New York Harbor ULSD Heating Oil (HO) futures contract and determined an appropriate hedge ratio, based on a regression analysis, of the HO futures contract to the quantity equivalent amount of its anticipated requirements. Airline A decided that it would use the HO futures contract to cross hedge part of its jet fuel price risk. In addition, Airline A decided to protect against jet fuel price increases by cross hedging another part of its anticipated jet fuel requirements with a long position in cash-settled calls in the NYMEX Heating Oil Average Price Option (AT) contract. The AT call option is settled based on the price of the HO futures contract. The sum of the notional amounts of the long position in AT call options and the long position in the HO futures contract will not exceed the quantity equivalent of 80 percent of Airline A's anticipated requirements for jet fuel.

Analysis: The positions meet the requirements of paragraphs (2)(i)(A)–(C) for hedges of a physical commodity, paragraph (3)(iii)(A) for unfilled anticipated requirements and paragraph (5) for cross-commodity hedges. The positions represent a substitute for transactions to be made in the physical marketing channel, are economically appropriate to the reduction of risks arising from anticipated requirements for jet fuel, and arise from the potential change in the value of such jet fuel. The aggregation notional amount of the airline's positions in the call option and the futures contract does not exceed the quantity equivalent of anticipated requirements for jet fuel. The value fluctuations in jet fuel are substantially related to the value fluctuations in the HO futures contract.

Airline A may hold its long position in the cash-settled AT call option contract as a cross hedge against jet fuel price risk without having to exit the contract during the spot month.

14. Position Aggregation Under § 150.4 and Inventory Hedge Under Paragraph (3)(i) of the Bona Fide Hedging Position Definition

Fact Pattern: Company A owns 100 percent of Company B. Company B buys and sells a variety of agricultural products, including wheat. Company B currently owns five million bushels of wheat. To reduce some of its price risk, Company B establishes a short position of 600 contracts in the CBOT Wheat futures contract, equivalent to three million bushels of wheat. After communicating with Company B, Company A establishes an additional short position of 400 CBOT Wheat futures contracts, equivalent to two million bushels of wheat.

Analysis: The aggregate short position in the wheat referenced contract held by Company A and Company B meets the general requirements for a bona fide hedging position under paragraphs (2)(i)(A)–(C) and the provisions for owning a cash commodity under paragraph (3)(i). Because Company A owns more than 10 percent of Company B, Company A and B are aggregated together as one person under § 150.4. Entities required to aggregate accounts or positions under § 150.4 are the same person for the purpose of determining whether a person is eligible for a bona fide hedging position exemption under § 150.3. The aggregate short position in the futures contract held by Company A and Company B represents a substitute for transactions to be taken at a later time in the physical marketing channel. The aggregate short position in the futures contract held by Company A and Company B is economically appropriate to the reduction of price risk because the aggregate short position in the CBOT Wheat futures contract held by Company A and Company B, equivalent to five million bushels of wheat, does not exceed the five million bushels of wheat that is owned by Company B. The price risk exposure for Company A and Company B results from a potential change in the value of that wheat.

■ 32. Add appendix D to part 150 to read as follows:

Appendix D to Part 150—Initial Position Limit Levels

Contract	Spot-month	Single month and all months
Legacy Agricultural		
Chicago Board of Trade Corn (C)	600	53,500
Chicago Board of Trade Oats (O)	600	1,600
Chicago Board of Trade Soybeans (S)	600	26,900
Chicago Board of Trade Soybean Meal (SM)	720	9,000
Chicago Board of Trade Soybean Oil (SO)	540	11,900
Chicago Board of Trade Wheat (W)	600	16,200
ICE Futures U.S. Cotton No. 2 (CT)	300	8,800
Kansas City Board of Trade Hard Winter Wheat (KW)	600	6,500
Minneapolis Grain Exchange Hard Red Spring Wheat (MWE)	600	3,300
Other Agricultural		
Chicago Board of Trade Rough Rice (RR)	600	2,200
Chicago Mercantile Exchange Class III Milk (DA)	1500	3,400
Chicago Mercantile Exchange Feeder Cattle (FC)	300	3,000
Chicago Mercantile Exchange Lean Hog (LH)	950	9,400

Contract	Spot-month	Single month and all months
Chicago Mercantile Exchange Live Cattle (LC)	450	12,900
ICE Futures U.S. Cocoa (CC)	1,000	7,100
ICE Futures U.S. Coffee C (KC)	500	7,100
ICE Futures U.S. FCOJ–A (OJ)	300	2,900
ICE Futures U.S. Sugar No. 11 (SB)	5,000	23,500
ICE Futures U.S. Sugar No. 16 (SF)	1,000	1,200
Energy		
New York Mercantile Exchange Henry Hub Natural Gas (NG)	1,000	149,600
New York Mercantile Exchange Light Sweet Crude Oil (CL)	3,000	109,200
New York Mercantile Exchange NY Harbor ULSD (HO)	1,000	16,100
New York Mercantile Exchange RBOB Gasoline (RB)	1,000	11,800
Metal		
Commodity Exchange, Inc. Copper (HG)	1,200	5,600
Commodity Exchange, Inc. Gold (GC)	3,000	21,500
Commodity Exchange, Inc. Silver (SI)	1,500	6,400
New York Mercantile Exchange Palladium (PA)	650	5,000
New York Mercantile Exchange Platinum (PL)	500	5,000

Issued in Washington, DC, on November 7, 2013, by the Commission.

Melissa D. Jurgens,

Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Position Limits for Derivatives—Commission Voting Summary and Statements of Commissioners

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton and Wetjen voted in the affirmative. Commissioner O'Malia voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the proposed rule to establish position limits for physical commodity derivatives.

The CFTC does not set or regulate prices. The Commission is charged with promoting the integrity of the futures and swaps markets. The Commission is charged with protecting the public from fraud, manipulation and other abuses.

Since the Commodity Exchange Act passed in 1936, position limits have been a tool to curb or prevent excessive speculation that may burden interstate commerce.

For a fuller understanding of this long history, refer to the excellent testimony of our former General Counsel Dan Berkovitz from July of 2009 titled: ''Position Limits and the Hedge Exemption, Brief Legislative History.''

In the Dodd-Frank Act, Congress directed the Commission to impose limits on speculative positions in physical commodity futures and options contracts and economically equivalent swaps.

The CFTC finalized a rule in October 2011 that addressed Congress' direction to prevent any single trader from obtaining too large a share of the market to ensure that derivatives markets remain fair and competitive. Last fall, a federal court vacated the rule.

It is critically important, however, that these position limits be established as Congress required.

The agency has historically interpreted our obligations to promote market integrity to include ensuring that markets do not become too concentrated. When the CFTC set position limits in the past, it sought to ensure that the markets were made up of a broad group of participants with no one speculator having an outsized position. This promotes the integrity of the price discovery function in the market by limiting the size of any one speculator's footprint in the market.

Position limits further protect the markets and clearinghouses, as such limits diminish the possible burdens when any individual participant may need to sell or liquidate a position in times of individual stress.

Thus, position limits help to protect the markets both in times of clear skies and when there is a storm on the horizon.

With a strong proposal ready for the Commission's consideration today, we determined that the best path forward to expedite position limits implementation was to pursue the new rule and dismiss the appeal of the court's ruling, subject to the Commission's approval of this proposal.

Today's proposed rule is consistent with congressional intent. The rule would establish position limits in 28 referenced commodities in agricultural, energy and metals markets as part of a phased approach.

It would establish one position limits regime for the spot month and another for single-month and all-months-combined limits.

Spot-month limits would be set for futures contracts that can be physically settled, as well as those swaps and futures that can only be cash settled. We are seeking additional comment on alternatives to a conditional spot-month limit exemption with regard to cash-settled contracts.

Single-month and all-months-combined limits, which the Commission currently sets only for certain agricultural contracts, would be reestablished in the energy and metals markets and be extended to swaps. These limits would be set using a formula that is consistent with that which the CFTC has used to set position limits for decades. The limits will be set based upon data on the total size of the swaps and futures market collected through the position reporting rules for futures, options on futures, and swaps.

Consistent with congressional direction, the rule also would allow for a bona fide hedging exemption for agricultural and exempt commodities. Also following congressional direction, there is a narrower exemption for swap dealers with regard to their use of futures and swaps to facilitate the bona fide hedging of their customers.

Today's proposed position limits rule builds on over four years of significant public input. In fact, this is the ninth public meeting during my tenure as Chairman to consider position limits.

We held three public meetings on this issue in the summer of 2009 and got a great deal of input from market participants and the broader public.

We also benefited from the more than 8,200 comments we received in response to the January 2010 proposed rulemaking to reestablish position limits in the energy markets.

We further benefited from input received from the public after a March 2010 meeting on the metals markets. In response to the January 2011 proposal, we received more than 15,100 comments.

Appendix 3—Statement of Commissioner Bart Chilton

For two reasons, this is a significant day for me. I am reminded of that great Etta James song, *At Last.*

The first reason is that, *at last,* we are considering what I believe to be the signal rule of my tenure here at the Commission; I've been working on speculative position limits since 2008. The second reason today is noteworthy is that this will be my last Dodd-Frank meeting. Early this morning, I sent a letter to the President expressing my intent to leave the Agency in the near future. I've waited until now—today—to get this proposed rule out the door, and now—at last—with the process coming nearly full circle, I can leave. It's with incredible excitement and enthusiasm that I look forward to being able to move on to other endeavors.

With that, here is a bit of history on the position limits journey that has led us, and me, to this day. The early spring of 2008 was a peculiar time at the Commission. None of my current colleagues were here. I and my colleagues at that time watched Bear Stearns fail. We had watched commodity prices rise as investors sought diversified financial havens. When I asked Commission staff about the influence of speculation on prices, some said speculative positions couldn't impact prices. It didn't ring true, and as numerous independent studies have confirmed since, it was not true.

I began urging the Commission to implement speculative position limits under our then-existing authority. And I was, at that time, the only Commissioner to support position limits. Given the concerns, I urged Congress to mandate limits in legislation. A Senate bill was blocked on a cloture vote that summer, but late in the session, the House actually passed legislation. Finally, in 2010, as part of the Dodd-Frank law, Congress mandated the Commission to implement position limits by early in 2011.

Within the Commission, I supported passing a rule that would have complied with the time-frame established by Congress—by any other name—federal law. A position limits rule was proposed in January of 2011 and finally approved in November.

In September 2012, literally days before limits were to be effective, a federal district court ruling tossed the rule out, claiming the CFTC had not sufficiently provided rationale for imposing the rule. We appealed and I urged us to address the concerns of the court by proposing and quickly passing another new and improved rule. I thought and hoped that we could move rapidly. After months of delay and deferral, it became clear: We could not.

But today—at last—more than three years since Dodd-Frank's passage, we are here to take it to the limits one more time.

Thankfully, we have it right in the text before us. The Commission staff has ultimately done an admirable job of devising a proposed regulation that should be unassailable in court, good for markets and good for consumers.

I thank everyone who has worked upon the rule: Steve Sherrod, Riva Adriance, Ajay Sutaria, Scott Mixon, Mary Connelly, and many others for their good work. In addition, I especially thank Elizabeth Ritter, my Chief of Staff, Nancy Doyle, and also Salman Banaei who has left the Agency for greener pastures. I thank them for their tireless efforts on the single most important, and perhaps to me the most frustrating, policy issue of my tenure with the Commission. I have had the true honor of working with Elizabeth since prior to my confirmation. I would be remiss if I did not reiterate here what I have often said; nowhere do I believe there is a brighter, smarter, more knowledgeable and hard-working derivatives counsel. She has served the public and me phenomenally well. Thank you, Elizabeth.

And finally to my colleagues, past and present, my respect to those whom we have been unable to persuade to vote with us on this issue, and my thanks to those who will vote in support of this needed and mandated rule. *At last!*

Thank you.

Appendix 4—Dissenting Statement of Commissioner Scott D. O'Malia

I respectfully dissent from the Commission's decision to approve the Notice of Proposed Rulemaking for Position Limits for Derivatives. I have a number of serious concerns with the position limits proposed rule and its interpretation of section 4a(a) of the Commodity Exchange Act (''CEA'' or ''Act'').[1] Regrettably, this proposal continues to chip away at the commercial and business operations of end-users and the vital hedging function of the futures and swaps markets.

I cannot support the position limits proposed rule that is before the Commission today because the proposal: (1) Fails to utilize current, forward-looking data and other empirical evidence as a justification for position limits; (2) fails to provide enough flexibility for commercial end-users to engage in necessary hedging activities; and (3) fails to establish a useful process for end-users to seek hedging exemptions.

We are the experts, but where's the evidence?

Recently, in connection with the Commission's vote to dismiss its appeal[2] of the vacated 2011 position limits rule,[3] I reiterated that the federal district court[4] had instructed the Commission to go back to the drawing board and do its homework.[5] As I have consistently stated, the Commission must perform a rigorous and objective fact-based analysis in order to determine whether position limits will effectively prevent or deter excessive speculation.[6] Not only that, but the Commission must also, in establishing any limits, ensure that there is sufficient market liquidity for hedgers and prevent disruption of the price discovery function of the underlying market. Unfortunately, the position limits rule that is being proposed today is not based upon a careful, disciplined review of market dynamics or the new data collected under our expanded oversight responsibilities provided for by the Dodd-Frank Act.[7]

In its second attempt at establishing a broad position limit regime that is in accordance with the statutory language amended by Dodd-Frank, the Commission relies on a new legal strategy—but not new data—in order to circumvent the spirit of the district court's decision. Surprisingly, the Commission now accepts that the statutory language in CEA section 4a(a)(1)[8] is ambiguous and that there is *not* a clear mandate from Congress to set position limits, contrary to the arguments made by the Commission both in court and in the vacated rule. Notwithstanding that concession, the proposed rule now hides behind *Chevron* deference and invokes the Commission's ''experience and expertise'' in order to justify setting position limits without performing an ex ante analysis using current market data.[9]

I am troubled that the proposal uses only two examples from the past—one of them as far back as the 1970s—to cobble together a weak, after-the-fact justification that position limits would have prevented market disruption. This is glaringly insufficient. Instead, the Commission should have taken the time to analyze the new data, especially from the swaps market, that has been collected under the Dodd-Frank Act. It is especially troubling that the large trader data being reported under Part 20 of Commission regulations[10] is still unreliable and unsuitable for setting position limit levels, almost two full years after entities began reporting data, and that we are forced to resort to using data from 2011 and 2012 as a poor and inexact substitute.

Today, the Commission proposes to set position limits for the futures and swaps markets *in the future,* not the past. I fail to see how we can be ''experts'' if we do not have the data to back us up. I fear that this reliance on a new legal strategy, instead of evidence-based standards, does little to affirm the Commission's self-proclaimed ''expertise'' and could result in another long and costly court challenge that will strain our limited resources.

Preserving Flexibility for Commercial End-Users

I am also concerned that the position limits proposed rule may not preserve enough flexibility for commercial end-users to hedge risks inherent in their business operations. Hedging is the foundation of our markets, and the intent of the Dodd-Frank Act was not to place excessive and unnecessary new regulatory burdens on end-users and make it more complicated and more costly to undertake risk management. That was strongly underlined in the letter sent to the Commission by Senators Dodd and Lincoln in June 2010.[11]

[1] 7 U.S.C. 6a(a).

[2] *ISDA & SIFMA* v. *CFTC,* No. 12–5362 (D.C. Cir.).

[3] 76 Fed. Reg. 71626 (Nov. 18, 2011).

[4] *Int'l Swaps & Derivations Ass'n* v. *CFTC, 887 F. Supp. 2d 259, 280–82 (D.D.C. 2012).*

[5] *http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement102913.*

[6] *http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliadissentstatement111512.*

[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

[8] 7 U.S.C. 6a(a)(1).

[9] NPRM pp. 12–14, 24, 32, 171.

[10] 17 C.F.R. part 20.

[11] Letter from Chairman Christopher Dodd, Committee on Banking, Housing, and Urban Affairs, United States Senate, and Chairman Blanche Lincoln, Committee on Agriculture, Nutrition, and Forestry, United States Senate, to Chairman Barney Frank, Financial Services Committee, United States House of Representatives, and Chairman Colin Peterson, Committee on Agriculture, United States House of Representatives (June 30, 2010).

Regrettably, the Commission's rules implementing Dodd-Frank have not adhered to that directive. This position limits proposal is just the latest in this disturbing trend of narrowly interpreting the statute to foreclose viable risk management functions that did not contribute to the financial crisis. This trend is nowhere more apparent than in how narrowly the proposal defines the concept of bona fide hedging.

The position limits proposed rule does away with Commission regulation 1.3(z),[12] which has been in effect since the 1970s, and sets forth new regulations that narrow the bona fide hedging definition, in particular the treatment of anticipatory hedging. This is despite the fact that the vacated position limits rule explicitly recognized certain anticipatory hedging transactions as falling within the statutory definition of bona fide hedging and consistent with the purposes of section 4a of the Act, and provided exemptions for such transactions given the condition that the trader was ''reasonably certain'' of engaging in the anticipated activity. In this proposal, based on an unsatisfactory ''further review,'' the Commission has changed its mind and has scaled back exemptions for anticipatory hedging. In all, the Commission has rejected half of the common hedging scenarios described by a working group of end-users in their petition for exemption.

I question whether the Commission has fulfilled Congress' intent to protect end-users by proposing a new position limits rule that articulates a far too narrow conception of bona fide hedging and does not reflect the realities of end-users' commercial and business operations.

[12] 17 CFR 1.3(z).

A Workable, Practical Process for Non-Enumerated Hedging Exemptions

I am especially troubled by the proposed rule's elimination of Commission regulations 1.3(z)(3) and 1.47,[13] which is the framework for market participants to seek a non-enumerated hedging exemption. I question whether eliminating a workable, practical process that has been outlined in Commission regulations for decades will make it more difficult for end-users to seek exemptions for legitimate hedging transactions and will cause unnecessary delay and interference with business operations.

Aggregation Proposed Rule

While I believe that today's aggregation proposed rule is more responsive than the vacated rule to the realities that market participants face in their utilization of the futures and swaps markets, some important concerns still remain.

First, the aggregation standards in the proposal present significant technology challenges for compliance, especially across affiliates. I would support a phase-in period to meet those challenges.

Second, I am concerned that there is insufficient consideration and flexibility in the ownership tiers that are used as a proxy for control. I would be interested in reviewing comments on pro rata aggregation, banding/tiering of ownership interest instead of full aggregation, and other issues with beneficial ownership. Further, I question whether the possible exemption for ownership in excess of 50% is of use to any market participants, given the additional conditions that are imposed.

[13] 17 CFR 1.3(z)(3) and 1.47.

Cost-Benefit Considerations

It is imperative that market participants carefully review the new position limits and aggregation proposed rules and provide comments. I especially encourage market participants to include any comments on the cost impact of the proposed position limits. I would also like to receive input from market participants about the cost of changes to their operations that were undertaken in order to prepare for compliance with the previous position limit rules, before those rules were vacated by the court. While the Commission failed to give enough weight to these consequences, I intend to carefully consider the comments and the critical information they provide in evaluating any draft final rule put before the Commission.

Conclusion

It is rare to get a second chance to do things right. I am disappointed by the Commission's approach today because the Commission has not taken advantage of the opportunity for a second chance presented by the district court decision to vacate the 2011 position limits rule. The Commission has failed in its duty as a responsible market regulator by not taking the time to gather the evidence and establish sound justifications for position limits ex ante that are based on data. Because of this failure, as well as the narrowing of the bona fide hedging definition and the elimination of the existing process for end-users to seek non-enumerated hedging exemptions, I cannot support this proposal.

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Parts 300 and 679

Pacific Halibut Fisheries; Catch Sharing Plan for Guided Sport and Commercial Fisheries in Alaska; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Parts 300 and 679

[Docket No. 101027534–3999–02]

RIN 0648–BA37

Pacific Halibut Fisheries; Catch Sharing Plan for Guided Sport and Commercial Fisheries in Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement a catch sharing plan for the guided sport (charter) and commercial fisheries for Pacific halibut in waters of International Pacific Halibut Commission Regulatory Areas 2C (Southeast Alaska) and 3A (Central Gulf of Alaska). This catch sharing plan replaces the Guideline Harvest Level program, defines an annual process for allocating halibut between the charter and commercial fisheries in Area 2C and Area 3A, and establishes allocations for each fishery. The commercial fishery will continue to be managed under the Individual Fishing Quota system. To allow flexibility for individual commercial and charter fishery participants, the catch sharing plan also authorizes annual transfers of commercial halibut quota to charter halibut permit holders for harvest in the charter fishery. This action is necessary to achieve the halibut fishery management goals of the North Pacific Fishery Management Council.

DATES: Effective January 13, 2014.

ADDRESSES: Electronic copies of the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (Analysis) prepared for this action are available from *http://www.regulations.gov* or from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.* A Final Regulatory Flexibility Analysis (FRFA) was prepared and is included in the Classification section of this final rule.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99082–1668, Attn: Ellen Sebastian, Records Officer, in person at NMFS, Alaska Region, 709 West 9th Street, Room 420A, Juneau, AK; and by email to *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Julie Scheurer, 907–586–7228.

SUPPLEMENTARY INFORMATION: This final rule implements the catch sharing plan for the halibut fisheries for International Pacific Halibut Commission regulatory areas 2C and 3A in Alaska. NMFS published a proposed rule in the **Federal Register** on June 28, 2013 (78 FR 39122) with comments invited through August 12, 2013. The comment period was extended to August 26, 2013 (78 FR 44920, July 25, 2013).

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I. Regulatory Authority

A comprehensive history of management of the charter fishery for halibut was published in the proposed rule for this action (78 FR 39122, June 28, 2013).

The International Pacific Halibut Commission (IPHC) and NMFS manage fishing for Pacific halibut (*Hippoglossus stenolepis*) through regulations implementing the Northern Pacific Halibut Act of 1982 (Halibut Act) (16 U.S.C. 773–773k). The IPHC adopts regulations governing the Pacific halibut fishery under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea (Convention), signed at Ottawa, Ontario, on March 2, 1953, as amended by a Protocol Amending the Convention (signed at Washington, DC, on March 29, 1979). For the United States, regulations developed by the IPHC are subject to acceptance by the Secretary of State with concurrence from the Secretary of Commerce. After acceptance, NMFS publishes the IPHC regulations in the **Federal Register** as annual management measures pursuant to 50 CFR 300.62. The final rule implementing IPHC regulations for the 2013 fishing season was published March 15, 2013 (78 FR 16423). IPHC regulations affecting sport fishing for halibut and vessels in the charter fishery in Areas 2C and 3A may be found in sections 3, 25, and 28 of that final rule.

The Halibut Act, at sections 773c(a) and (b), provides the Secretary of Commerce with general responsibility to carry out the Convention and the Halibut Act. In adopting regulations that may be necessary to carry out the purposes and objectives of the Convention and the Halibut Act, the Secretary of Commerce is directed to consult with the Secretary of the department in which the U.S. Coast Guard is operating (currently the Department of Homeland Security).

The Halibut Act, at section 773c(c), also provides the North Pacific Fishery Management Council (Council) with authority to develop regulations, including limited access regulations, that are in addition to, and not in conflict with, approved IPHC regulations. Regulations developed by the Council may be implemented by NMFS only after approval by the Secretary of Commerce. The Council has exercised this authority in the development of subsistence halibut fishery management measures and the guideline harvest level (GHL) program, codified at 50 CFR 300.65, and the limited access program for charter operators in the charter fishery, codified at 50 CFR 300.67. The Council also developed the Individual Fishing Quota (IFQ) Program for the commercial halibut and sablefish fisheries, codified at 50 CFR part 679, under the authority of section 773c(c) of the Halibut Act and section 303(b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

The Council developed the regulations to implement this catch sharing plan pursuant to section 773c(c) of the Halibut Act.

II. Catch Sharing Plan for Area 2C and Area 3A

The following paragraphs summarize the catch sharing plan (CSP) implemented by this final rule. Additional information is provided in the preamble to the proposed rule.

A. Need for Action

The Council developed the CSP in IPHC Regulatory Areas 2C and 3A to address the ongoing allocation conflict between the commercial and charter halibut fisheries. The commercial halibut fishery is subject to defined allocations of individual harvest shares that generally rise and fall with changes in halibut abundance, while the allocations to the charter halibut fishery, which experienced many years of sustained annual growth in Areas 2C and 3A, were not increased or decreased in direct relationship with changes in fishery abundance. The commercial IFQ and charter halibut fishery are harvesting a fully utilized resource. The primary objectives of the CSP are to define an annual process for allocating halibut between the charter and commercial halibut fisheries in Area 2C and Area 3A, establish by regulation sector allocations that vary in proportion with changing levels of annual halibut abundance and that balance the differing needs of the charter and commercial halibut fisheries over a wide range of halibut abundance in each area, and describe a public process by which the Council may develop recommendations to the IPHC for charter angler harvest restrictions that are intended to limit harvest to the annual charter halibut fishery catch limit in each area.

B. General

The CSP allocations will replace the GHL with a percentage allocation of the annual combined (commercial and charter) catch limit to the charter halibut fishery, with the remainder allocated to the commercial halibut fishery. The Council intends to continue the process it used in 2011 and 2012 to recommend to the IPHC annual management measures for the charter halibut fishery prior to the upcoming fishing season based on projected harvests and charter catch limits.

The annual CSP catch limits for the commercial and charter halibut fisheries will be determined by a predictable and standardized process by which the IPHC develops and adopts its annual management measures for the halibut fisheries. This rule establishes a regulatory formula for determining the commercial and charter halibut fisheries' catch limits for each area. The IPHC's annual combined catch limits for 2C and 3A will be apportioned between the annual charter catch limit and annual commercial catch limit in each area in accordance with the CSP's sector allocation formula published in this final rule. At its annual meeting in January, the IPHC will consider the Council's recommendations designed to constrain the charter halibut fisheries in 2C and 3A to their allocated annual catch limits, and will consider the advice of IPHC staff, advisors, and the public. The IPHC will be expected to adopt the catch limits and appropriate management measures necessary to maintain the sectors' harvest within those catch limits as part of the IPHC's halibut fishery conservation and management regulations. Should the Secretary of State accept the IPHC regulations, with concurrence of the Secretary of Commerce, the approved IPHC regulations will be published in the **Federal Register** as specified by regulations at 50 CFR 300.62.

The IPHC annual management measures remain in effect until superseded. In most years, the effective date of the IPHC annual management measures has been around March 15. Thus, the period between the February 1 opening of the sport season and the mid-March effective date of the superseding annual management measures has been subject to the previous year's IPHC regulations. This schedule will continue unless the IPHC changes the February 1 opening for the sport fishing season. However, implementation of the annual management measures in March likely does not impact the charter halibut fishery because there has historically been little or no charter halibut harvest from February 1 through mid-March.

Alaska Department of Fish and Game (ADF&G) saltwater charter logbooks will be used as the primary data source to estimate the number of halibut harvested in the charter halibut fishery following each charter halibut fishing season and to project the number of halibut harvested in the charter fishery in the following year. The ADF&G saltwater charter logbook is the primary reporting requirement for operators in the charter fisheries for all species harvested in saltwater in Areas 2C and 3A.

In order to provide flexibility for individual commercial and charter halibut fishery participants, the CSP authorizes annual transfers of commercial halibut IFQ as guided angler fish (GAF) to charter halibut permit holders for harvest in the charter halibut fishery. GAF offers charter halibut permit holders in Area 2C or Area 3A an opportunity to lease a limited amount of IFQ from commercial quota share (QS) holders to allow charter clients to harvest halibut in addition to, or instead of, the halibut harvested under the daily bag limit for charter anglers. Charter anglers using GAF are subject to the harvest limits in place for unguided sport anglers in that area. Currently, there is a two-fish of any size daily bag limit for unguided sport anglers in Areas 2C and 3A. GAF harvested in the charter halibut fishery will be accounted for as commercial halibut IFQ harvest.

Except for authorizing commercial halibut QS holders to transfer IFQ as GAF to charter halibut permit holders, the CSP does not change the management of the commercial halibut fisheries in Area 2C and Area 3A. The directed commercial halibut fisheries in Area 2C and Area 3A are managed under the IFQ Program pursuant to regulations at 50 CFR 679 subparts A through E. This rule amends only sections of the IFQ Program's regulations to authorize transfers between IFQ and GAF and establish the requirements for using GAF.

C. Specification of the Annual Combined Catch Limits

Under the CSP, the IPHC is expected to specify an annual combined catch limit for Area 2C and for Area 3A at its annual meeting in January. Each area's annual combined catch limit in net pounds will be the total allowable halibut harvest for the directed commercial halibut fishery plus the total allowable halibut harvest for the charter halibut fishery under the CSP.

The IPHC process for determining the annual combined catch limit under the CSP will be similar to the process it has typically used in the past for determining annual commercial catch limits. A notable exception is how each fishery's wastage will be deducted from the combined catch limit (described further below). This process was explained in detail in the proposed rule and in Figure 1 below.

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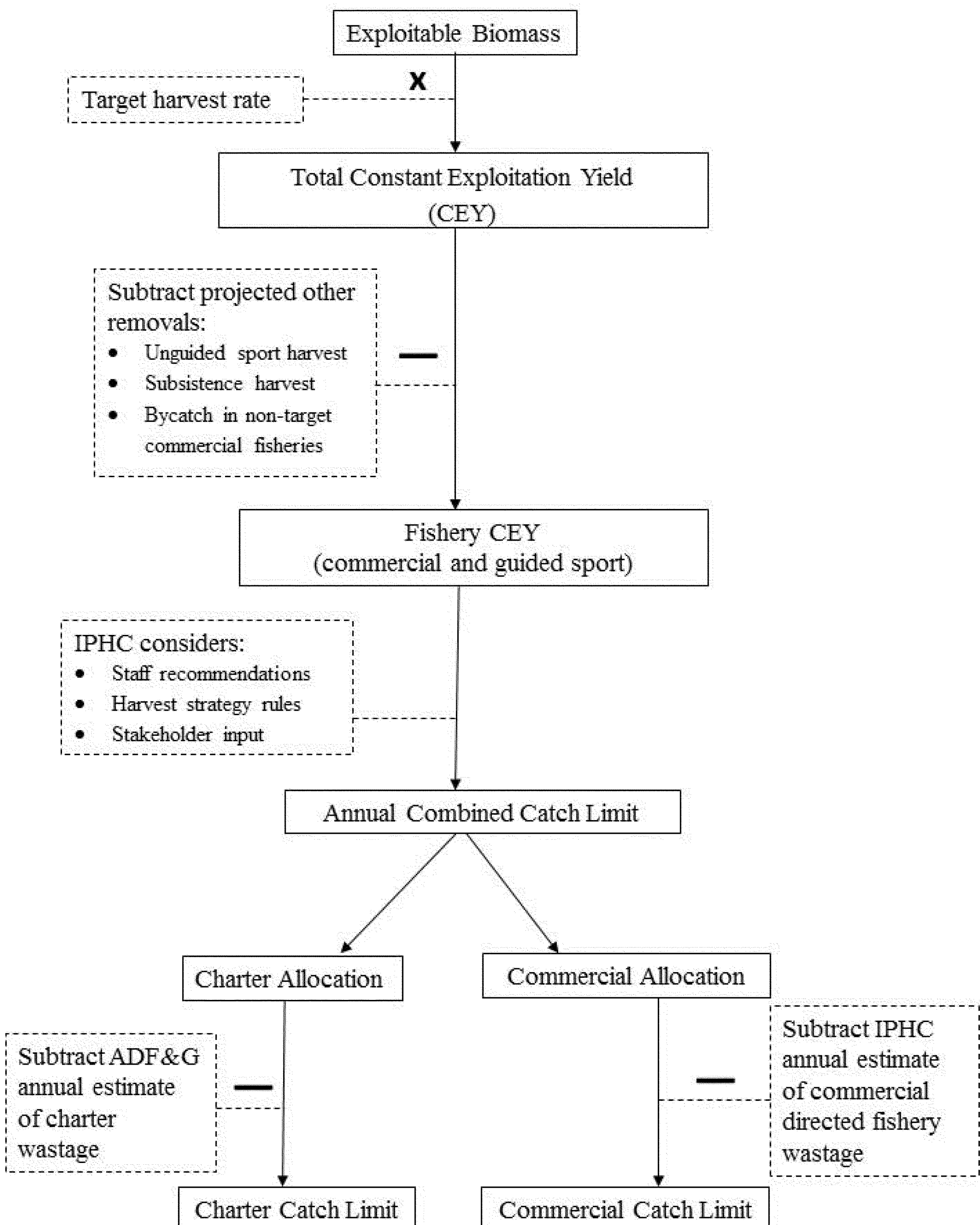
Figure 1. Process for Setting Annual Combined Catch Limits, Charter and Commercial Allocations, and Charter and Commercial Catch Limits for Area 2C and Area 3A Under the Catch Sharing Plan



D. Calculation of Annual Commercial Fishery and Charter Fishery Allocations and Catch Limits

The CSP contemplates that the IPHC will divide the annual combined catch limits (CCLs) into separate annual catch limits for the commercial and charter halibut fisheries pursuant to the CSP's allocation formulas. The IPHC will multiply the CSP allocation percentages for each area by the annual CCL to calculate the commercial and charter halibut allocations in net pounds. Fishery-specific catch limits will be calculated by deducting separate estimates of wastage from the commercial and charter halibut allocations, as described in the following section. NMFS will publish the CCLs and associated allocations for the charter and commercial halibut fisheries in the **Federal Register** as part of the IPHC annual management measures pursuant to 50 CFR 300.62.

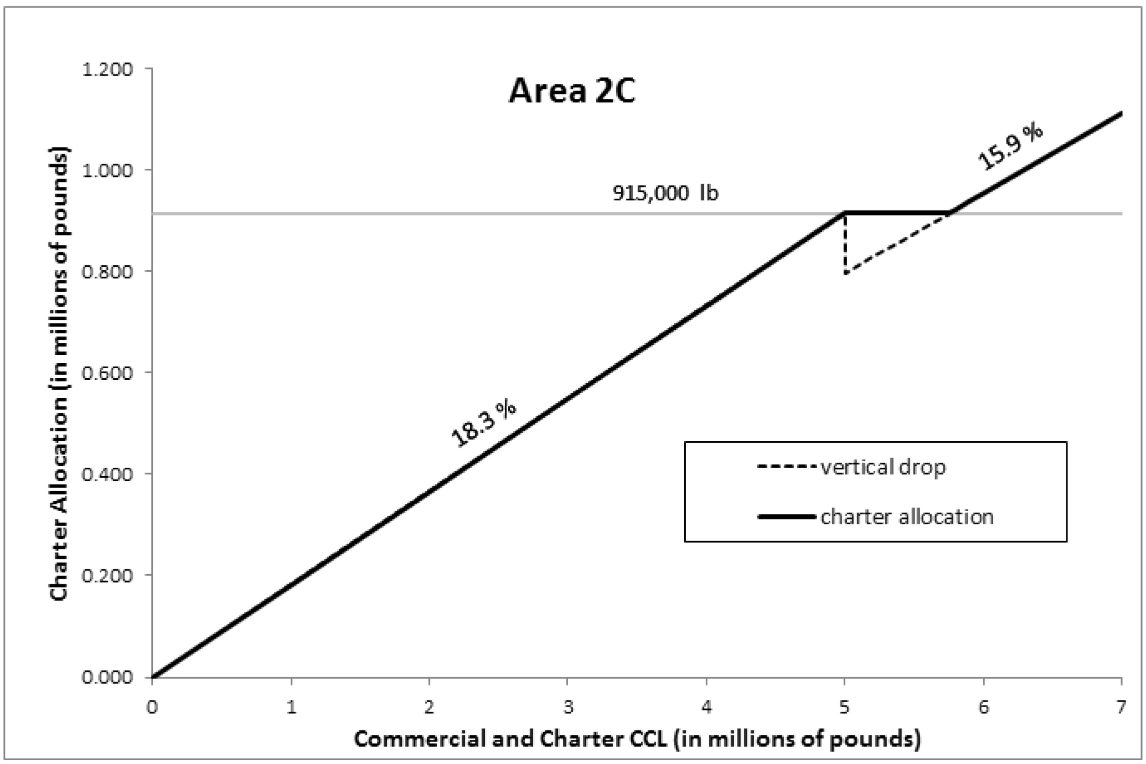
This is similar to the process by which the IPHC allocates its combined catch limit for halibut for Areas 4C–4D–4E among each of those three subareas pursuant to the Council's Area 4 Catch Sharing Plan (*http://alaskafisheries.noaa.gov/npfmc/PDFdocuments/halibut/Area4CSP605.pdf*).

The CSP establishes three allocation tiers for Area 2C as shown in Table 1 and Figure 2 below.

TABLE 1—AREA 2C CATCH SHARING PLAN (CSP) ALLOCATIONS TO THE CHARTER AND COMMERCIAL HALIBUT FISHERIES RELATIVE TO THE ANNUAL COMBINED CATCH LIMIT (CCL)

Area 2C annual combined catch limit for halibut in net pounds (lb)	Charter halibut fishery CSP allocation (% of annual combined catch limit)	Commercial halibut fishery CSP allocation (% of annual combined catch limit)
0 to 4,999,999 lb	18.3%	81.7%.
5,000,000 to 5,755,000 lb	915,000 lb	Area 2C CCL minus 915,000 lb.
5,755,001 lb and up	15.9%	84.1%.

Figure 2. Area 2C Charter Allocations at Varying Levels of the Annual Combined Catch Limit (CCL)



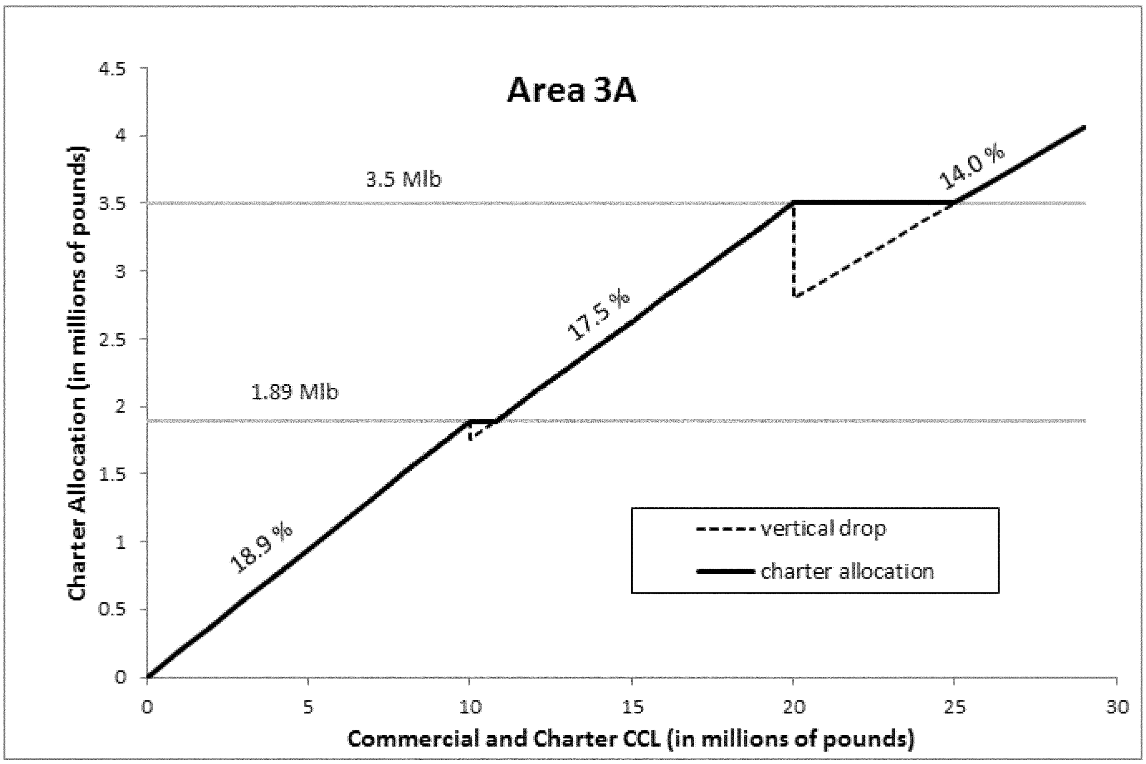
When the IPHC sets an annual CCL of less than 5,000,000 lb (2,268 mt) in Area 2C, the commercial halibut fishery allocation will be 81.7 percent and the charter halibut fishery allocation will be 18.3 percent of the annual CCL. When the IPHC sets the annual CCLs at the second tier, between 5,000,000 lb and 5,755,000 lb (2,610.4 mt), the allocation to the charter halibut fishery will be a fixed 915,000 lb (405 mt), to smooth the vertical drop in the poundage allocation that would occur without this adjustment. The rationale for this fixed poundage adjustment is described in the preamble to the proposed rule on page 39131. The commercial halibut fishery will be allocated the Area 2C CCL minus the 915,000 lb fixed allocation to the charter halibut fishery. When the IPHC sets the annual CCL at the third tier, greater than 5,755,000 lb (2,610.4 mt), in Area 2C, the commercial halibut fishery allocation will be 84.1 percent and the charter halibut fishery allocation will be 15.9 percent of the Area 2C annual CCL.

The CSP establishes five allocation tiers in Area 3A as shown in Table 2 and Figure 3 below.

TABLE 2—AREA 3A CATCH SHARING PLAN (CSP) ALLOCATIONS TO THE CHARTER AND COMMERCIAL HALIBUT FISHERIES RELATIVE TO THE ANNUAL COMBINED CATCH LIMIT (CCL)

Area 3A annual combined catch limit for halibut in net pounds (lb)	Charter halibut fishery CSP allocation (% of annual combined catch limit)	Commercial halibut fishery CSP allocation (% of annual combined catch limit)
0 to 9,999,999 lb	18.9%	81.1%.
10,000,000 to 10,800,000 lb	1,890,000 lb	Area 3A CCL minus 1,890,000 lb.
10,800,001 to 20,000,000 lb	17.5%	82.5%.
20,000,001 to 25,000,000 lb	3,500,000 lb	Area 3A CCL minus 3,500,000 lb.
25,000,001 lb and up	14.0%	86.0%.

Figure 3. Area 3A Charter Allocations at Varying Levels of the Annual Combined Catch Limit



For Area 3A, when the IPHC sets the annual CCLs at the first tier, less than 10,000,000 lb (4,535.9 mt), the commercial halibut fishery allocation will be 81.1 percent and the charter halibut fishery allocation will be 18.9 percent of the Area 3A annual CCL. For Area 3A annual CCLs between 10,000,000 lb and 10,800,000 lb (4,898.8 mt), the allocation to the charter halibut fishery will be 1,890,000 lb (857.3 mt). The commercial halibut fishery will be allocated the Area 3A CCL minus the 1,890,000 lb fixed allocation to the charter halibut fishery. When the CCL is greater than 10,800,000 lb and less than 20,000,000 lb, the commercial halibut fishery will be allocated 82.5 percent and the charter fishery will be allocated 17.5 percent. When the CCL for Area 3A is set at greater than 20,000,000 lb and less than or equal to 25,000,000 lb (11,339.8 mt), the charter halibut fishery will receive a fixed 3,500,000 lb allocation. The commercial halibut fishery allocation will equal the CCL minus 3,500,000 lb. Finally, at CCLs greater than 25,000,000 lb, the commercial halibut fishery allocation will be 86 percent and the charter halibut fishery allocation will be 14 percent of the Area 3A annual CCL.

Under the CSP, the commercial and charter halibut fisheries are separately accountable for their discard mortality or ''wastage,'' such that each fishery's wastage will be deducted from its respective allocation to obtain its catch limit (see Figure 1).

E. Annual Process for Setting Charter Management Measures

Charter halibut annual management measures in Area 2C and 3A will be set according to the annual process described in the proposed rule for this action. In short, each year the Council will review an analysis of potential charter management measures for the Area 2C and Area 3A charter halibut fisheries for the upcoming fishing year. This will allow the Council and public to engage in a transparent process for considering both stakeholder input and the most current information regarding the charter fishery and its management. After reviewing the analysis and considering public testimony, the Council will identify the charter halibut management measures to recommend to the IPHC that will most likely constrain charter halibut harvest for each area within its allocation, while considering impacts on charter operations. The IPHC will consider the Council recommendations and input from its stakeholders and staff and then will adopt either the Council's recommendation or alternative charter halibut management measures designed to keep charter harvest in Area 2C and Area 3A to the allocations specified by this final rule. These measures will be necessary to limit the combined commercial and charter harvest in Area 2C and 3A within each area's combined catch limit. NMFS will publish in the **Federal Register** the charter halibut management measures for each area as part of the IPHC annual management measures accepted by the Secretary of State with the concurrence of the Secretary of Commerce.

The Council, its Scientific and Statistical Committee, the IPHC, and NMFS will continue to assess effectiveness of this method of recommending and implementing charter management measures after the CSP is implemented.

Two restrictions are removed from Federal regulations: the one-fish daily bag limit for Area 2C at § 300.65(d)(2)(i); and the line limit at § 300.65(d)(2)(iii). Instead, daily charter halibut fishery bag limits will be established in the IPHC annual management measures.

F. Other Restrictions Under the CSP

NMFS is implementing five additional restrictions under the CSP. First, the prohibition on retention of halibut by skipper and crew on a charter vessel fishing trip in Area 2C is extended to also include Area 3A. Second, individuals who hold both a charter halibut permit and commercial halibut IFQ will be prohibited from fishing for commercial and charter halibut on the same vessel during the same day in Area 2C and Area 3A. Third, individuals who hold both a charter halibut permit and a Subsistence Halibut Registration Certificate will be prohibited from using both permits to harvest halibut on the same vessel during the same day in Area 2C and Area 3A. Fourth, charter vessel operators will be required to indicate the date of a charter vessel fishing trip in the saltwater charter logbook and to complete all of the required fields in the logbook before the halibut are offloaded. And finally, the logbook signature requirement for charter anglers in Area 2C will be extended to include charter anglers in Area 3A.

G. Guided Angler Fish (GAF)

The CSP authorizes supplemental individual transfers of commercial halibut IFQ as GAF to qualified charter halibut permit holders for harvest by charter vessel anglers in Areas 2C and 3A. Using GAF, qualified charter halibut permit holders may offer charter vessel anglers the opportunity to retain halibut up to the limit for unguided anglers when the charter management measure in place limits charter vessel anglers to a more restrictive harvest limit.

An IFQ holder is eligible to transfer halibut IFQ as GAF if he or she holds at least one unit of halibut QS and has received an annual IFQ permit authorizing harvest of IFQ in either the Area 2C and Area 3A commercial halibut fishery. A charter halibut permit holder is eligible to receive IFQ as GAF if he or she holds one or more charter halibut permits in the management area that corresponds to the IFQ permit area from which the IFQ would be transferred. Holders of military charter halibut permits and Community Quota Entities holding community charter halibut permits will also be eligible to receive IFQ as GAF. No changes to the eligibility criteria were made from the proposed rule.

For transfers between IFQ and GAF, the IFQ holder and charter halibut permit holder receiving GAF will be required to submit an application to NMFS. Application forms and instructions will be available on the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.*

NMFS will issue GAF in numbers of halibut. NMFS will post the conversion from IFQ pounds to a GAF for Area 2C and Area 3A for each fishing year on the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.* NMFS will post the conversion factor for the current fishing year before the beginning of the commercial halibut fishing season each year. The methods for calculating the conversion factors were described in the preamble to the proposed rule and are not repeated here.

Upon completion of the transfer between IFQ and GAF, NMFS will issue a GAF permit to the holder of a charter halibut permit. The GAF permit will be assigned to the charter halibut permit specified by the GAF permit holder at the time of application. The GAF permit holder may offer GAF for harvest by charter vessel anglers on board the vessel on which the operator's GAF permit and the assigned charter halibut permit are used.

Charter operators will be required to possess GAF in their GAF permit accounts prior to allowing charter vessel anglers to retain halibut as GAF. Transfers cannot occur after the fish have been caught. The GAF permit holder also will be required to have the GAF permit and the assigned charter halibut permit on board the vessel on which charter vessel anglers retain GAF, and to present the permits if requested by an authorized enforcement officer. GAF permit holders will be required to retain all GAF permits and GAF permit logs for two years after the date of issuance and to make them available for inspection upon request of an authorized enforcement officer.

NMFS will issue a revised GAF permit to the GAF permit holder each time during the year that it approves a transfer between IFQ and GAF for that GAF permit. Each GAF permit will be assigned to only one charter halibut permit in Area 2C or Area 3A, specified on the application for transfer between IFQ and GAF. That assignment cannot be changed during the year. Once GAF is transferred to a charter halibut permit holder and assigned to a specified charter halibut permit, it may not be transferred to another charter halibut permit holder.

Unused GAF may be returned to the IFQ holder by two methods: a voluntary return that can be requested in August and that will be completed on or after September 1, and an automatic return 15 days before the end of the commercial halibut fishing season. On and after the automatic return date, unused GAF will no longer be authorized for use in the charter fishery in the current year. Applications for transfer of IFQ to GAF will not be accepted during the one month prior to the automatic return date, to ensure that all GAF transactions are completed before the automatic return date. No application is required for the automatic return of unused GAF. NMFS will return any remaining unharvested GAF to the IFQ holder from whom it was derived. On or as soon as possible after the voluntary or automatic GAF return dates, NMFS will convert GAF in number of fish to IFQ in net pounds using the conversion factor for that year and return the converted IFQ to the IFQ holder's account.

This rule includes three restrictions on GAF transfers. First, IFQ holders in Area 2C will be limited to transferring up to 1,500 lb (680.4 kg) or 10 percent, whichever is greater, of their initially issued annual halibut IFQ for use as GAF. In Area 3A, IFQ holders may transfer up to 1,500 lb or 15 percent, whichever is greater, of their initially issued annual halibut IFQ for use as GAF. Second, no more than a total of 400 GAF will be assigned during one year to a GAF permit assigned to a charter halibut permit that is endorsed for six or fewer anglers. And third, no more than a total of 600 GAF will be assigned during one year to a GAF permit assigned to a charter halibut permit endorsed for more than six anglers. This rule does not limit the amount of GAF transfers for military charter halibut permits. Community Quota Entities (CQEs) that hold quota share are allowed to transfer IFQ as GAF. The limits on these transfers depend on whether the GAF permit holder is a CQE, an eligible community resident, or a non-resident. GAF transfer restrictions were described in more detail on pages 39140–39141 of the proposed rule for this action and are not repeated here.

This rule implements new recordkeeping and reporting requirements for GAF in the ADF&G saltwater charter logbooks, in addition to saltwater charter logbook reporting requirements currently specified at § 300.65(d). The ADF&G saltwater charter logbook will continue to be used as the primary reporting method for operators in the charter halibut fishery. The person to whom ADF&G issued a saltwater charter logbook is required to retain and make available for inspection by authorized enforcement personnel the completed original logbooks for two years following the charter vessel fishing trip. This rule also will require GAF permit holders to record information on the GAF permit; separately report retained GAF by 11:59 p.m. (Alaska local time) on the last day of the fishing trip in which GAF were retained using a NMFS-approved electronic reporting system; record the electronic reporting confirmation number on the GAF permit log; and retain the GAF permits and GAF permit logs for two years.

Charter guides will be required to mark retained GAF by removing the tips of the upper and lower lobes of the caudal (tail) fin. Additionally, the charter vessel guide will be required to retain the carcass showing caudal fin clips until the halibut fillets are offloaded so that enforcement can verify the length and that the fish was retained as GAF. For each halibut retained as GAF, charter vessel guides will immediately record on the GAF permit log the date and total halibut length in inches.

GAF permit holders landing GAF on private property will be required to allow enforcement personnel access to the point of landing.

Commercial IFQ holders will be responsible for all cost recovery fees on IFQ equivalent pounds harvested for their IFQ permit(s) and also for net pounds transferred and harvested as GAF that originated from their IFQ account(s). NMFS will levy IFQ cost recovery fees on all net pounds of halibut harvested as IFQ in the commercial fishery and as GAF in the charter fishery. Cost recovery fees for GAF were discussed in further detail in the proposed rule for this action and are not repeated here.

III. Other Regulatory Changes

This action makes four additional regulatory changes that were explained in detail in the preamble to the proposed rule. These are minor changes that clarify existing regulations, but do not substantively change how the halibut fishery is managed. The first change clarifies the regulations to describe the current process by which the IPHC Area 4 catch sharing plan is promulgated in § 300.65(b). The second change updates instructions in regulations at § 679.5(l)(7) for Registered Buyers to complete and submit the IFQ Registered Buyer Ex-vessel Value and Volume Report form. The third change clarifies regulations at § 679.40 to describe the separate processes for allocating halibut IFQ and sablefish IFQ, and clarifies that commercial halibut fishery overage adjustments from the previous year will be subtracted from a person's IFQ, and commercial halibut fishery underage adjustments from the previous year will be added to a person's IFQ. The fourth change revises regulations at § 679.45(a)(4) to update instructions for IFQ permit holders for submitting cost recovery fee payments to NMFS and update the fee payment form and instructions to incorporate GAF in the calculation of an IFQ permit holder's cost recovery fee liability. NMFS received no comments on these changes.

IV. Changes From the Proposed Rule

This action was proposed and public comments were solicited for 45 days beginning on June 28, 2013 (78 FR 39122), and ending on August 12, 2013. At public request, a 14-day extension of the comment period was granted prior to the end of the public comment period (78 FR 44920, July 25, 2013). The extended public comment period ended on August 26, 2013. By the end of the public comment period, 4,740 submissions were received. Unique issues raised in those comments received by the end of the comment period are summarized and responded to below under the heading ''V. Comments and Responses.'' The following 21 changes are made from the proposed rule in this final rule. Changes 3, 8 through 10, 12 through 14, 16, 18, 19, and 21 below were made in response to public comments. The remainder of the changes correct incorrect cross-references to other paragraphs or make minor clarifications to the text.

Definitions § 300.61

1. In developing the final rule, NMFS noted that six definitions pertaining to the charter halibut fishery contained an incorrect cross-reference. The proposed definitions for ''charter vessel angler,'' ''charter vessel fishing trip,'' ''charter vessel guide,'' ''charter vessel operator,'' ''crew member,'' and ''sport fishing guide services'' all stated, ''for purposes of §§ 300.65(d) . . .'' Regulatory text implementing the CSP replaces the GHL regulatory text at § 300.65(c), so the definitions need to apply to paragraph (c) as well. NMFS changed these six definitions so they apply to all of § 300.65.

Implementation § 300.65(c)(2)

2. In the proposed rule, paragraph § 300.65(c)(2) stated that the ''CSP annual allocations and guided sport catch limits are adopted by the Commission as annual management measures and published by NMFS in the **Federal Register** as required in § 300.62.'' The IPHC will adopt and NMFS will publish the annual CCL, the annual commercial catch limit, and the annual guided sport catch limit, but not necessarily the CSP allocation percentages that were applied to the CCL to obtain the sector catch limits. The text of this paragraph has been revised to reflect this change.

Transfer Between IFQ and GAF § 300.65(c)(5)(ii)

3. In the proposed rule at paragraph § 300.65(c)(5)(ii)(B)(*2*), NMFS proposed October 15 as the last day that applications could be submitted to transfer IFQ to GAF. Two commenters noted that the GAF automatic return date is 15 days before the close of the commercial fishing season, which varies annually. In some years, the commercial fishery closes in early November. In those years, a GAF permit holder requesting a transfer of IFQ to GAF near the proposed deadline of October 15 may not have enough time to harvest that GAF before the automatic return date. NMFS agrees with the comment and has changed the deadline for transfer applications to one month prior to the closing date of the commercial fishery so the application deadline will adjust with the season dates. This change will ensure that GAF permit holders will have a minimum of two

weeks to harvest their GAF before the automatic return date.

4. NMFS proposed regulations at § 300.65(c)(5)(ii)(D(4)(iv) requiring a CQE to submit a complete annual report to NMFS as specified in § 679.5(l)(8) to receive GAF by transfer. NMFS published a final rule on June 4, 2013 (78 FR 33243), to consolidate reporting regulations and specify additional requirements for a CQE to submit a complete annual report at § 679.5(t). NMFS has revised this final rule at § 300.65(c)(5)(ii)(D)(4)(iv) to cross-reference the revised CQE reporting requirements at § 679.5(t).

5. Paragraph § 300.65(c)(5)(ii)(E)(*2*) of the proposed rule stated, ''If no GAF were harvested in a year, the conversion factor would be calculated using the same method as for the first calendar year after the effective date of this rule.'' NMFS changed the word ''would'' to ''will'' in this sentence to read, ''If no GAF were harvested in a year, the conversion factor will be calculated . . .'' This change is to clarify that this process will occur and is not discretionary.

Guided Angler Fish Permit § 300.65(c)(5)(iii)

6. NMFS has changed the wording of paragraph § 300.65(c)(5)(iii)(A)(*7*) describing GAF permit retention requirements. The proposed requirement states, ''GAF permit holders must retain GAF permit(s) for two years after the end of the fishing year . . .'' The back of the GAF permit contains the ''GAF permit log'' where guides must record dates, lengths, and electronic reporting confirmation numbers for harvested GAF. GAF transfer limits allow up to 600 GAF to be transferred to a charter halibut permit (CHP) on a GAF permit. The GAF permit log on the back of the permit may not have sufficient room to record all of the GAF harvested under that GAF permit. Supplemental GAF permit log pages will be available to download from the NMFS Web site at *http://alaskafisheries.noaa.gov/.* NMFS changed the wording of this requirement to specify that all GAF permits and all associated GAF permit logs must be retained for two years after the end of the fishing year.

GAF Use Restrictions § 300.65(c)(5)(iv)

7. On page 39142 of the proposed rule, NMFS stated that in addition to clipping the tails of retained GAF, the charter vessel guide would be required to ''retain the carcass showing caudal fin clips until the halibut fillets were offloaded so that enforcement could verify the length and that the fish was retained as GAF.'' The requirement to mark GAF by clipping the tail fin was proposed at § 300.65(c)(5)(iv)(G), but this paragraph did not specify the carcass retention requirement. Paragraph (G) has been revised to reflect this requirement.

8. The Council did not specify, and NMFS did not propose, GAF transfer limits for military charter halibut permits. NMFS received a comment that, to avoid confusion, the regulatory text at § 300.65(c)(5)(iv)(H) should explicitly state that the GAF transfer limits do not apply to military charter halibut permits. NMFS agrees and has changed the text accordingly.

Retention and Inspection of Logbook Requirements § 300.65(d)(2)

9. The proposed logbook retention requirement at § 300.65(d)(2) proposed a number of requirements that would have applied to ''the person to whom the Alaska Department of Fish and Game issues the Saltwater Sport Fishing Charter Trip Logbook and who retains halibut.'' Comments received from ADF&G noted that anyone can be issued a logbook that is assigned to a business for use on a particular vessel and ADF&G does not record the name of the person to which the logbook is issued. ADF&G assumed that NMFS was proposing to impose the requirements of § 300.65(d) to owners of the business to which a logbook is assigned, and suggested the language should be clarified as such. NMFS agrees with this comment and has changed § 300.65(d)(1) and (2) to impose the requirements to any ''person whose business was assigned an Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook.'' Second, ADF&G noted that charter vessel anglers are the persons who retain halibut. Businesses, guides, and deckhands are prohibited from retaining halibut under the CSP; therefore, the phrase ''and who retains halibut'' in § 300.65(d)(2) should actually refer to charter vessel anglers who retain halibut. NMFS agrees with this comment and has changed § 300.65(d)(2) clarify that the requirements apply to any ''person who is required to provide information pursuant to paragraph (d)(4) of this section, or whose business was assigned an Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook and whose charter vessel anglers retain halibut.''

10. Proposed paragraph § 300.65(d)(2)(i) stated that a person whose business was assigned a saltwater charter logbook must ''retain the logbook for 2 years after the end of the fishing year for which the logbook was issued . . .'' A comment from ADF&G noted that because data pages may be removed from a logbook, the language should be clarified to ensure that halibut logbook data pages are retained during the specified period. NMFS agrees and has revised paragraph (i) as suggested to read, ''Retain all logbook data pages showing halibut harvest for 2 years after the end of the fishing year for which the logbook was issued . . .''

Recordkeeping and Reporting Requirements § 300.65(d)(4)

11. NMFS proposed general recordkeeping and reporting requirements at § 300.65(d)(4)(i). These instructions contained an incorrect cross-reference to paragraph (d)(4)(ii)(C) for an exception from the recordkeeping and reporting requirements. NMFS has corrected the cross-reference to paragraph (d)(4)(iii)(C) in this final rule.

12. NMFS' proposed instructions for completing the saltwater charter logbook at § 300.65(d)(4)(ii)(B)(*5*) would have required that charter vessel guides record the six-digit statistical area code in which halibut were caught and retained. A comment from ADF&G noted that in the Kodiak management area, ADF&G requires charter guides to record five-digit salmon statistical areas when targeting salmon, even if halibut are caught incidentally and retained. ADF&G suggested removing the words ''six-digit'' so the instruction could apply to either type of statistical area, as necessary. NMFS agrees and has made the requested change. ADF&G will also update the instructions printed in the saltwater charter logbook to reflect this change.

13. ADF&G noted a typographical error in proposed paragraph § 300.65(d)(4)(ii)(B)(*6*). The proposed first sentence of that paragraph read, ''Before a charter vessel fishing trip begins, record *for* the first and last name of each paying or non-paying charter vessel angler . . .'' NMFS has removed the word ''for'' from this sentence.

14. In response to a comment from ADF&G, NMFS changed language under GAF reporting requirements at § 300.65(d)(4)(iii)(A)(*1*) to specify where on the GAF permit the date and GAF length must be recorded. The proposed language stated only that the required information must be recorded on the GAF permit. The revised language clarifies that the required information must be recorded ''on the GAF permit log (on the back of the GAF permit) . . . NMFS noted the need for this change after the proposed rule was published as NMFS developed the GAF permit and

GAF permit log for implementation of this final rule.

15. NMFS has made minor changes to the introductory text for GAF electronic reporting at § 300.65(d)(4)(iii)(D). The proposed paragraph would have required the GAF permit holder to electronically report specific information ''for each GAF retained.'' Since the proposed rule was published, NMFS has further developed the GAF electronic reporting system such that most of the data elements in the following paragraphs (*1*) through (*9*) will need to be entered only once for each fishing trip, rather than for each GAF retained. This change reduces the reporting burden for charter vessel guides. The introductory text in paragraph (D) has been changed accordingly.

16. In response to a comment, NMFS is adding a requirement to record the date GAF were caught and retained to the electronic reporting data elements for GAF at § 300.65(d)(4)(iii)(D). When preparing the proposed rule, NMFS anticipated that because electronic reports are due by 11:59 p.m. on the day a charter vessel angler retains GAF, the date could be automatically filled by the online reporting system as the same date that the data were reported. NMFS received a comment noting that for multi-day trips, the GAF permit holder is not required to submit the electronic report until 11:59 p.m. on the last day of the charter vessel fishing trip. In the case of multi-day trips, GAF permit holders may report GAF harvested on more than one day and corresponding to multiple pages in the ADF&G saltwater charter logbook in a single electronic report. Therefore, for proper accounting and to facilitate enforcement, NMFS must require GAF permit holders to also enter the date. NMFS agrees with the comment, so the date requirement was added as paragraph (d)(4)(iii)(D)(*5*) and subsequent paragraphs were renumbered.

17. The proposed rule at § 300.65(d)(4)(iii)(D)(*6*) would have required that charter vessel guides report the ''length of GAF caught and retained'' in the electronic report. NMFS has reworded this requirement to clarify that guides must report the ''length of each GAF caught and retained.'' NMFS has also renumbered this paragraph as (d)(4)(iii)(D)(*7*).

18. NMFS reworded paragraph § 300.65(d)(4)(iii)(E)(*1*) under GAF reporting requirements in response to a public comment that it was not clear who was responsible for compliance with this requirement. The reworded paragraph specifies that the GAF permit holder is responsible for ensuring that all GAF harvested on board a vessel are debited from the GAF permit holder's account under which the GAF were retained.

19. The paragraph at § 300.65(d)(4)(iii)(E)(*2*) under proposed GAF reporting requirements was reworded in response to a public comment to specify where the GAF electronic reporting confirmation number should be recorded and by whom. The reworded paragraph specifies that the GAF electronic confirmation number shall be recorded on the GAF permit log by the GAF permit holder.

20. Based on the public comment resulting in changes 17 and 18 above, NMFS further clarified the instructions for a properly reported GAF landing by adding paragraph § 300.65(d)(4)(iii)(E)(*3*). This paragraph provides a cross-reference to paragraph (d)(4)(iii)(A)(*4*), which describes how to correct a submitted GAF landing electronic report.

Prohibitions § 300.66

21. On page 39136 of the proposed rule, NMFS discussed the Council's intent to prohibit individuals who hold both a charter halibut permit and commercial halibut IFQ from fishing for commercial and charter halibut on the same vessel during the same day in Area 2C and 3A. Consistent with the recommendation, NMFS proposed prohibiting individuals who hold both a charter halibut permit and a Subsistence Halibut Registration Certificate from using both permits to harvest halibut on the same vessel during the same day in Area 2C and Area 3A. NMFS intended to include both of these prohibitions at § 300.66(h). NMFS received a comment noting that the prohibition at paragraph (h) was incorrect and only prohibited subsistence and commercial fishing for halibut on the same vessel during the same day. NMFS agrees with the comment and has corrected paragraph (h) to prohibit, with some exceptions, individuals from conducting subsistence fishing for halibut while commercial fishing or sport fishing for halibut, as defined in § 300.61, from the same vessel on the same calendar day.

V. Comments and Responses

The proposed rule for this action was published on June 28, 2013 (78 FR 39122), and public comments on it were accepted until August 26, 2013. NMFS received approximately 4,740 comment submissions raising 153 unique issues within the scope of this action. Comments that resulted in changes from the proposed rule were addressed in the previous section. The remaining comments were reviewed, organized into nine topical categories, and responded to as follows:

Allocation

Comment 1: The CSP allocations to the charter sector would result in catch limits that are lower than the GHL at current halibut stock levels. This change to the allocation is unjustified.

Response: NMFS disagrees that the change is unjustified. One of the objectives of the CSP is to establish Area 2C and Area 3A sector allocations that balance the differing needs of the charter and commercial sectors over a wide range of halibut abundance, and that increase or decrease (''float'') with varying levels of halibut abundance. To accomplish this objective, the Council and NMFS replaced the GHL with sector allocations that vary directly with halibut abundance. A fixed percentage of the annual CCL will be allocated to each sector across a wide range of potential CCLs. The allocation to each sector will vary with halibut abundance, with higher allocations inuring to the charter halibut fishery at lower levels of abundance. A detailed description of the allocations to the charter sector under the CSP is included in the proposed rule and in the Analysis. The Council determined that use of a fixed percentage allocation of the CCL to each fishery under the CSP will result in both the commercial and charter halibut fishery allocations adjusting directly up and down more directly proportionate to changes in halibut abundance.

As described in section 1.1.1 of the Analysis and in the proposed rule for this action, the GHL is not as directly responsive as the CSP to changes in halibut abundance. Fixed GHLs for Areas 2C and 3A were established annually, in pounds, and did not fluctuate directly with halibut stock abundance, while commercial catch limits do fluctuate directly with stock abundance. The GHL has five poundage levels in relation to the allowable removals of halibut from all sources (Total CEY). The GHLs were reduced if the area-specific Total CEY declined by at least 15 percent below the average 1999 through 2000 Total CEY, as determined by the IPHC. For example, if the Total CEY in Area 2C fell by between 15 percent and 24 percent below its 1999 through 2000 average, then the GHL would have been reduced from 1,432,000 lb to 1,217,000 lb. If the Total CEY declined by between 25 percent and 34 percent, then the GHL would have been reduced from 1,432,000 lb to 1,074,000 lb. If the Total CEY continued to decline by at least 10 percent, the GHL would have been reduced from 1,074,000 lb by an additional 10 percent to 931,000 lb. If the Total CEY declined by an additional 10 percent or more, the GHL would have been reduced by an additional 10 percent from 931,000 lb to the baseline level of 788,000 lb. The Area 2C GHL would not be reduced below 788,000 lb. If the Area halibut biomass increased, the GHL could be increased only to its initial level of 1,432,000 lb, but no higher.

The proposed rule describes the effects of the GHL in the Area 2C and Area 3A charter halibut fisheries in circumstances when Total CEY declines did not trigger a GHL reduction. During some years of declining Total CEY under the GHL, the commercial halibut fishery IFQ allocations were reduced, but there was no change in the charter halibut fishery GHLs. Conversely, in years when the Total CEY increased, the GHL did not allow the charter halibut fishery to fully benefit from this increase.

Section 2.5.10 of the Analysis describes that under the GHL program, the proportion of total halibut harvested in the Area 2C and Area 3A commercial halibut fishery has declined and the proportion harvested in the charter halibut fishery has increased. From 2008 through 2012, the Area 2C commercial halibut fishery harvest declined from 60.2 percent to 43.1 percent of the Total CEY, and charter halibut fishery harvest increased from 14.3 percent to 15.9 percent of the Total CEY over the same time period. In Area 3A, commercial halibut fishery harvest decreased from 76.8 percent to 60.3 percent of the Total CEY, and charter halibut fishery harvest increased from 12.6 percent to 15.7 percent of the Total CEY from 2008 through 2012. Thus, while both the GHL and commercial halibut fishery catch limits have declined in recent years, the commercial halibut fisheries have borne larger poundage and proportional reductions under the current allocation system. This resulted in negative economic impacts on commercial halibut fishery participants from reduced catch limits, which contributed to the instability and conflict between user groups that the Council intended to address with the CSP.

It is true that at moderate to low levels of halibut abundance, the CSP would provide the charter halibut fishery with a smaller poundage allocation than the guideline limits established under the GHL program. The Council and NMFS took this into consideration in its evaluation of the CSP and the GHL. Section 2.5 of the Analysis shows that at CCLs of less than 9.5 million lb in Area 2C and 26 million lb in Area 3A, the CSP poundage allocation to the charter sector would be lower than the GHL. Conversely, at CCLs of greater than 9.5 million lb in Area 2C and 26 million lb in Area 3A, the CSP would provide the charter halibut fishery with a larger poundage allocation than the guideline limits established under the GHL program. The Council and NMFS considered the differences in the estimated CSP poundage allocations compared to the GHL for recent years. Section 2.8 of the Analysis estimates that if the CSP had been in place in recent years, the charter sector poundage allocation likely would have been less than the GHL from 2008 through 2012 in Area 2C and from 2009 through 2012 in Area 3A.

Moreover, the Council and NMFS have taken into account the capability of vessels used in the commercial and charter fisheries for halibut to engage in other fisheries and economic endeavors. The charter halibut industry provides marine transportation and sport fishing guide services to anglers wishing to catch halibut. Charter vessel businesses provide these services also to anglers wishing to catch salmon, rockfish, lingcod, and other bottomfish. In addition, charter vessel businesses in Areas 2C and 3A may provide marine transportation for bird watching, whale watching, and general sightseeing. Passengers using these services may be independent tourists, guests at lodges, or travelers on cruise ships. Charter vessel businesses may focus their business plan on sport anglers wishing to catch halibut, but other business plans are possible given the variety of reasons why an individual may want to engage the services of a charter vessel.

Having conducted a comprehensive analysis of the GHL and the CSP, the Council and NMFS have determined that the CSP allocations implemented by this final rule provide a clear, transparent, and equitable allocation between the two sectors.

Comment 2: In November 2009, a U.S. District Court determined that the GHL is a fair and equitable allocation (*VanValin* v. *Locke* (671 F. Supp 2d 1 D.D.C. 2009)). Because the CSP reduces the allocation to the charter sector from the status quo GHL, it cannot be fair and equitable. Therefore, the charter fishery should continue to be managed to its GHL allocations.

Response: VanValin v. *Locke* involved a legal challenge to the GHL. That case does not preclude the subsequent consideration and implementation of alternative allocations between the commercial and charter sectors that differ from the GHL. Pursuant to section 773c(c) of the Halibut Act, where the Council develops regulations that allocate halibut fishing privileges among United States fishermen, such allocation ''must be fair and equitable to all fishermen.'' This language is adopted directly from National Standard 4 of the Magnuson-Stevens Act (16 U.S.C. 1851(a)(4)). The terms ''fairness and equity'' have been interpreted in NOAA Fisheries' National Standard Guidelines (the Guidelines) (see 50 CFR 600.325(c)(3)(i)(A)). The Guidelines provide that there should be a rational relationship between an allocation of fishing privileges and the furtherance of a legitimate fishery management objective. The Guidelines further provide that ''inherent in an allocation is the advantaging of one group to the detriment of another.'' The Council may develop, and the Secretary of Commerce may implement, regulations allocating fishing privileges that result in hardship to one group if such burdens are outweighed by the total benefits received by another group. ''An allocation need not preserve the status quo in the fishery to qualify as 'fair and equitable,' if a restructuring of fishing privileges would maximize overall benefits'' (see 50 CFR 600.325(c)(3)(i)(B)).

The CSP allocations are fair and equitable. As described in the Analysis and in the proposed rule for this action, the Council and NMFS decided to replace the GHL with sector allocations that balance the differing needs of the charter and commercial sectors, and that float with varying levels of halibut abundance. See also the response to Comment 1. The GHL is not as responsive or adaptable to changes in halibut abundance. While both the GHL and commercial fishery catch limits have declined in recent years, the commercial halibut fisheries have borne larger poundage and proportional reductions under the current allocation system. The Council noted that the absence of a hard allocation between the commercial and the charter halibut sectors has resulted in conflicts between sectors and tensions in coastal communities dependent on the halibut resource.

The CSP allocations to the commercial and charter sectors will result in both fishery allocations adjusting directly with changes in halibut exploitable biomass. This will stabilize the proportions of harvestable halibut available to the commercial and charter fisheries at all levels of halibut abundance, allowing both the commercial and charter sectors to share in the benefits and costs of managing the halibut resource and providing a more equitable management response to changes in halibut biomass compared to the GHL policy. Also see the response to Comment 6.

Comment 3: The CSP allocations to the charter sector are demonstrably fair and equitable. The Area 2C charter allocation includes as baseline years for calculating the allocation percentage two years when charter harvest exceeded the GHL, 2004 and 2005, which rewards the charter sector for exceeding the GHL. The Council chose not to use more recent years in which charter harvests were even higher in consideration of the effects on commercial halibut fishery participants. The commenter notes that in *Van Valin* v. *Locke* the court ruled that charter operators should not be rewarded for exceeding the GHL. The court stated that where overfishing by one group in recent years is the precise concern that the regulation intends to address, it makes sense to disregard the most recent participation data (Id. at 11). If the CSP errs at all relative to allocation equity, it errs in awarding too large a percentage of the halibut resource to the charter sector.

Response: NMFS acknowledges the comment and notes that the preamble to the proposed rule and section 1.6.7 of the Analysis describe the Council's rationale for recommending the CSP allocations to the commercial and charter sectors. Also see the response to Comment 26.

Comment 4: A court found the GHL to be fair and equitable, but that is not the only allocation that could be fair and equitable. The Council has the authority to recommend a different allocation that could also be fair and equitable.

Response: As described in the response to Comment 2, the Council and NMFS have articulated a legitimate objective for establishing the CSP in Area 2C and Area 3A. To accomplish this objective, the Council and NMFS properly determined to replace the GHL with sector allocations that vary directly with halibut abundance. The Secretary of Commerce has determined that this final rule is consistent with the Halibut Act requirement that allocation of fishing privileges be fair and equitable to halibut fishermen.

Comment 5: The proposed rule states that the problem is uncompensated reallocation of the halibut from the commercial to the charter sector. The percentage of the CCL allocated to the charter sector decreases at high levels of abundance. How are guided anglers compensated for this reallocation of fish to the commercial sector at high levels of abundance?

Response: NMFS disagrees with the commenter's characterization of the proposed rule. Page 39123 of the proposed rule noted that ''[t]he commercial IFQ halibut fishery therefore views charter harvests in excess of established policies or goals as uncompensated reallocations of fishing privileges.'' This statement follows a description of the IPHC process for determining commercial catch limits under the GHL program, and was included in the proposed rule preamble to express the view of commercial halibut fishery participants that consider charter harvests in excess of established harvest policies (the GHL from 2004 through 2013), as uncompensated reallocation of halibut from the commercial to the charter sector. The purpose and need for the CSP is described in section 1.2 of the Analysis and the proposed rule (see the ''III. Proposed Catch Sharing Plan (CSP) for Area 2C and Area 3A'' section beginning on page 39125). The CSP also would allow the charter sector to increase its allocation by leasing IFQ from the commercial sector. The proposed sector allocations are intended to fluctuate proportionately with halibut abundance. In recommending the CSP, the Council balanced its objective to establish an allocation to the Area 2C and Area 3A commercial and charter sectors that varies proportionately with halibut abundance while maintaining this historical charter season length with no inseason changes to harvest restrictions. Also see the response to Comment 6.

NMFS agrees that under the CSP, the proportion of the CCL allocated to the charter sector at relatively higher levels of abundance is less than the proportion allocated to the charter sector at relatively lower levels of abundance. The proposed rule for CSP describes the rationale for the allocations to the commercial and charter sectors in Area 2C and Area 3A.

NMFS disagrees that the CSP allocation to the charter sector at higher levels of halibut abundance results in a reallocation of halibut to the commercial sector. As described in the proposed rule for the CSP, the Council balanced its objective to establish clear allocation to sectors that varies in proportion with halibut abundance with the needs of the charter and commercial fisheries at all levels of halibut abundance.

Comment 6: The Problem Statement says that the absence of a hard allocation between the longline and the charter halibut sectors has resulted in conflicts between sectors and tensions in coastal communities dependent on the halibut resource. What is a hard allocation? Is the GHL a hard allocation? What makes the CSP allocation any more of a hard allocation than the GHL?

Response: NMFS interprets the Council's reference to a hard allocation in its problem statement to mean an allocation between the directed commercial halibut fishery and the charter fishery that is clear, transparent, and varies in proportion to changes in halibut abundance. The Council intended for the CSP to be a comprehensive management program for the charter halibut fisheries in Areas 2C and 3A, with sector allocations that balance the differing needs of the charter and commercial sectors over the range of halibut abundance, that float with varying levels of annual halibut abundance, and that include a public process for developing management measures intended to limit the charter sector to its allocation.

As described in the response to Comment 1, management of the charter fishery under the GHL program resulted in the commercial fishery bearing a disproportionate amount of the declines in halibut exploitable biomass relative to the charter sector. This changing proportional allocation of a fully utilized halibut resource between the sectors under the GHL program created instability between user groups that the Council sought to address with the commercial and charter sector halibut allocations implemented by this final rule. This action is intended to maintain stability, economic viability, and diversity of halibut user groups by addressing allocation conflicts between participants in the commercial and charter halibut fisheries. The Secretary of Commerce has determined that the CSP allocations are consistent with the Council's objectives as described in its problem statement and the purpose and need for the CSP described in section 1.2 of the Analysis.

Comment 7: The Problem Statement says that unless a mechanism for transfer between sectors is established, the existing environment of instability and conflict will continue. The Council seeks to address this instability while balancing the needs of all who depend on the halibut resource for food, sport, or livelihood. Does NMFS believe that a plan that reallocates without compensation 30 percent or more of the current allocation to commercial fishermen while allowing guided anglers to rent those same fish back is going to address the existing environment of instability and conflict? How are guided anglers compensated for this reallocation from the GHL?

Response: As discussed in the response to Comment 1, this final rule establishes an allocation in which both the commercial and charter halibut fisheries share in the benefits and costs of managing the resource for long-term sustainability. The Council anticipated, and NMFS agrees, that stabilizing the method of allocating halibut between the sectors will alleviate allocation conflicts between halibut user groups in Areas 2C and 3A. As described in the proposed rule for this action, the Council faced the challenge of balancing historical halibut harvests, economic impacts to the commercial and charter sectors, and the recent decline in halibut abundance in both areas as it developed its recommendation. As a result, it is not possible for any allocation consistent with the Council's objectives to make participants in both fisheries ''whole'' economically given current halibut abundance levels.

In recognition that allocations under the CSP to the charter sector may be constraining at current low levels of halibut abundance, the Council recommended the GAF program to meet the needs of the charter halibut fisheries in Areas 2C and 3A and provide flexibility for participants in both sectors. The GAF program was not intended to provide a mechanism to replace reductions in the charter allocation relative to current or historical harvest levels. GAF will provide a voluntary, market-based mechanism for transferring halibut allocation from the commercial sector to the charter sector in order for the charter sector to access additional halibut under a potentially constraining allocation. It provides flexibility for operators in both the commercial and charter sectors. Individual charter and commercial operators will be able to consider current halibut catch limits in relation to their operational needs when determining whether to use the GAF program. The Council and NMFS anticipate that GAF may be used by charter anglers particularly in years of low halibut abundance, when charter catch limits under the CSP may be constraining.

Comment 8: Optimum yield for the halibut fisheries has changed. The charter fishery harvest increased during the 1990s and early 2000s in response to shifting optimum utilization. The increased economic benefits from the charter sector and indirect support services are being ignored by the IPHC. The IPHC continues to consider the commercial fishery to be the optimal use of the resource.

Response: NMFS agrees that charter fishery harvest increased during the 1990s and early 2000s. The resulting reallocation of harvest from the commercial sector has resulted in conflicts between sectors and tensions in coastal communities that are dependent on the halibut resource. The Council, not the IPHC, developed the CSP to address this instability while balancing the needs of all who depend on the halibut resource for food, sport, or livelihood. Specification of optimum yield for halibut fisheries is not required by the Halibut Act and has not been determined. See *Charter Operators of Alaska* v. *Blank,* 11–cv–00664 (RCL) (D.D.C., February 24, 2012). As described in the response to Comment 120, the Council and NMFS considered the anticipated effects of the allocation to the charter sector at all levels of abundance as analyzed in section 2.5 of the Analysis, and the potential impacts on the charter sector in section 2.6 of the Analysis.

Comment 9: The commercial IFQ halibut sector perceives that charter harvests in excess of established policies or goals as uncompensated reallocations of fishing privileges from the commercial sector to the charter sector. This is the problem the CSP is intended to remedy; however, this is an erroneous objective. Pursuant to Article III of the Halibut Convention, the IPHC must develop and maintain halibut stocks to levels that will permit the optimum yield for the halibut fisheries. The harvest of halibut in Alaska occurs in three fisheries: the commercial, sport, and subsistence fisheries. The optimum yield for the sport fishery will be adversely impacted by the proposed changes. The IPHC fails in its duty to protect the current allocation if it implements the proposed changes.

Response: The commenter mischaracterizes the problem the Council intended to address with the CSP. The Council's problem statement provides that ''[t]he absence of a hard allocation between the commercial longline and charter halibut sectors has resulted in conflicts between sectors, and tensions in coastal communities that are dependent on the halibut resource. Unless a mechanism for transfer between sectors is established, the existing environment of instability and conflict will continue. The Council seeks to address this instability, while balancing the needs of all who depend on the halibut resource for food, sport, or livelihood.'' The CSP addresses this problem statement by establishing allocations for both sectors that fluctuate with halibut abundance, and by establishing a mechanism to transfer halibut between the sectors (GAF).

Second, the commenter mischaracterizes Article III of the Convention. ''Developing the stocks of halibut of the Northern Pacific Ocean and Bering Sea to levels which will permit the optimum yield from that fishery and . . . maintaining the stocks at those levels'' does not require the IPHC to maintain a current allocation. Nothing in the Convention obligates the IPHC to maintain the GHL as the allocation between charter and commercial sectors to achieve the optimum yield from the sport sector or from any specific sector of the halibut fishery. The Council and NMFS have developed and implemented the CSP pursuant to the Halibut Act as the appropriate allocation between the commercial sector and charter sector.

Comment 10: The CSP does not reflect current management practices nor present participation in the fishery. For example, present participation in the commercial halibut fishery has changed significantly through a reduction in the number of quota share holders. Additionally, the Council ignored 2011 data on commercial and charter catch to favor commercial IFQ holders.

Response: The Council considered present and historical management and participation in the fishery when developing the CSP. The Analysis takes into account present participation in the commercial and charter halibut fisheries and considered alternative sector allocations under the CSP. Specifically, the Analysis includes information on harvests and participation in the commercial and charter halibut fisheries through 2011, the most recent year for which information was available regarding participation in the charter halibut fisheries in Areas 2C and 3A when the Council recommended its preferred alternative in October 2012. The 2011 charter fishery was the first full year in which the charter halibut limited access program was in effect in Areas 2C and 3A. As discussed in the proposed rule for this action, the charter halibut limited access program capped the number of charter businesses that could operate in Areas 2C and 3A to limit further expansion of the industry.

The Council's consideration of each sector's recent participation and halibut harvest levels were particularly important in developing its recommendation of sector allocations under the Area 2C and Area 3A CSP because halibut abundance levels have declined in those areas in recent years. The Analysis described the effects of changing the method of allocating halibut between the commercial and charter sectors under the alternatives considered by the Council. The Analysis estimated the CSP allocations to the commercial and charter sectors that would have been specified from 2008 through 2012 if the CSP had been in place. Section 2.8 of the Analysis, which shows that the catch sharing allocations could constrain charter harvests compared to the status quo when halibut abundance is low, as it has been in recent years. However, the Council and the Secretary of Commerce also considered the disproportionate impact of halibut abundance declines on the commercial sector catch limits under the GHL program, and determined that the CSP allocations implemented by this final rule meet the management objective of establishing sector allocations that vary directly with halibut abundance while balancing the halibut needs of the commercial and charter sectors with respect to recent participation.

The Analysis also took into account historical fishing practices in and dependence on the charter halibut fisheries as it considered alternative allocations to the commercial and charter halibut fisheries for the CSP. The Analysis included information on harvests and participation in the commercial and charter halibut fisheries from 1995 through 2011. The Council's preferred alternative for allocations to the commercial and charter fishery was based on each sector's harvest as percentage of the combined commercial and charter halibut harvest for several sets of years ranging from 1995 through 2005. In considering these data, the Council also considered estimates of revenues from participation in the commercial and charter halibut fisheries to evaluate historical fishing practices in and dependence on the charter halibut fisheries for both sectors.

As described in the Analysis, fishery participation is often measured in pounds of the targeted fish species landed. Charter vessel businesses, however, primarily market a sport fishing experience rather than pounds of fish caught. Thus, while it is not possible to quantify or directly compare dependence on the halibut resource by participants in the commercial and charter halibut fisheries using available information, the Analysis presented the Council and the Secretary of Commerce with sufficient information to take into account dependence on the halibut fisheries by participants in both sectors when recommending sector allocations under the CSP. The evaluation of the potential effects of the alternatives in sections 2.5 and 2.6 of the Analysis informed the Council during its development of this action and the Secretary of Commerce's decision to approve it.

Finally, the Council also took into account historical fishing practices in the charter halibut fisheries by continuing to avoid in-season changes to charter harvest restrictions and maintain a traditional charter halibut season length. The charter halibut fisheries have traditionally been managed with pre-season specifications of harvest restrictions without in-season adjustments or closures during the charter fishing season. The CSP recommended by the Council and approved by the Secretary of Commerce maintains this approach to managing the charter halibut fisheries in Areas 2C and 3A.

Comment 11: The CSP likely will promote strong industry desire for the charter sector to stay within its allocation because overages will roll over into the following season and reduce the successive season's charter catch limit.

Response: Halibut harvest in the Area 2C or Area 3A charter fishery that exceeds the charter allocation in any one year, also called an overage, will not be deducted from the charter allocation in the following year. The CSP allocations to the Area 2C and Area 3A commercial and charter halibut fisheries will not change annually. See the response to Comment 1.

Comment 12: The CSP allocations are generous to the charter sector, but it is time to settle the allocation debate and implement the CSP, even though it comes at a cost to the commercial sector and consumers.

Response: NMFS acknowledges the comment. As described in the response to Comment 1, one of the Council's primary objectives for the CSP is to establish a comprehensive management program for the charter halibut fisheries in Area 2C and Area 3A, with sector allocations that balance the differing needs of the charter and commercial sectors over the range of abundance and that float with varying levels of halibut abundance.

Comment 13: I support the allocations proposed in the Council's 2008 CSP recommendation. I am opposed to any increases to the charter sector from that allocation.

Response: NMFS acknowledges the comment. As described in the proposed rule, the Council adopted a motion in 2008 to recommend a CSP for the charter and commercial halibut fisheries in Areas 2C and 3A to NMFS. In July 2011, NMFS published a proposed rule for that CSP based on the Council's 2008 preferred alternative (76 FR 44156, July 22, 2011) and received more than 4,000 public comments. The majority of the comments addressed the proposed allocation percentages and the matrix of charter halibut fishery harvest restrictions that would have been automatically triggered by changes in the Area 2C and Area 3A annual CCLs supported by halibut exploitable biomass. In October 2011, in part due to questions raised in the public comments on the proposed rule, NMFS and the Council decided that further analysis and clarification of provisions of the proposed 2011 CSP were required. In December 2011, the Council requested a supplemental analysis of new information since its 2008 preferred alternative. This included an evaluation of the management implications and economic impacts of the proposed CSP at varying levels of halibut abundance. Based on this new evaluation and additional public input, the Council recommended a revised preferred alternative for the CSP in October 2012, which included the recommendations for allocations to the commercial and charter sectors that float with changes in halibut abundance. See section 2.5.7 of the Analysis for a review of the CSP allocations based on the Council's 2008 recommendation. Also see the response to Comment 7.

Comment 14: The CSP allocations demonstrate the Council's careful consideration of the potential impacts to the charter sector while tasked with developing a functional management plan for a fully allocated resource.

Response: NMFS agrees. Also see the response to Comment 7.

Comment 15: Under the CSP, both the commercial sector and the charter sector are tied to the same IPHC metric of stock status with clear, defined allocations.

Response: As described in the proposed rule for the CSP and in section 1.6.7 of the Analysis, the Council and NMFS recognize that one of the advantages of the CSP over the GHL program is that it uses the same method to establish commercial and charter halibut fishery allocations. The Council and the Secretary of Commerce have determined that the allocation to the commercial and charter halibut fisheries under the CSP provides a more transparent and equitable management response than the GHL program.

Comment 16: We hope NMFS will avoid the use of words such as "benchmark" to describe the CSP allocations. Such terms used for the GHL invited multiple lawsuits that were costly to the industry, the public, and the resource. The CSP sets clear allocations for the charter sector and a process to prevent allocation overages before they occur. This must be reflected in the final rule.

Response: NMFS acknowledges the comment and notes that regulations implementing this final rule specify the determination of Area 2C and Area 3A annual charter halibut allocations from the annual CCL (see Tables 3 and 4 to subpart E of part 300).

Comment 17: The CSP's allocations to the charter sector are reduced from those proposed in 2011. For example, the 2013 Area 2C CSP allocations are less than the 2008 proposed CSP allocations after the calculations are adjusted for changes in accounting methods and sector accountability are considered.

Response: If the 2011 proposed rule for a CSP had been implemented, it would have allocated the charter sector 17.3 percent of the Area 2C combined catch limit (CCL) below 5 million lb, and 15.1 percent of the CCL above 5 million lb. The CSP implemented by this final rule establishes allocations to the charter sector in Area 2C of 18.3 percent and 15.9 percent of the CCL at low and high abundance, respectively. In Area 3A, the 2011 proposed rule for a CSP would have allocated the charter sector 15.4 percent of the CCL at low abundance and 14.0 percent at high abundance. The CSP implemented by this final rule establishes allocations to the Area 3A charter sector of 18.9 percent at low abundance, 17.5 percent at moderate abundance, and 14.0 percent at high abundance. Additionally, for Areas 2C and 3A the CSP includes fixed poundage allocations between percentage tiers to remove the ''vertical drops'' in allocation that would have occurred under the 2011 CSP (see Comment 20). Overall, the allocations provided to the charter sector in this rule are greater than the allocations contemplated in the 2011 proposed rule.

Comment 18: Why was Alternative 3 chosen as the allocation option for Area 2C? It appears to be a punitive response to the 2C charter sector for exceeding the GHL due to inadequate and inappropriate management measures. Previous overharvests were a result of poor management, not as a result of illegal fishing practices.

Response: NMFS agrees that charter harvests did not exceed the GHL due to illegal fishing practices. The GHL was exceeded in some years in part due to the rapid growth in the charter halibut industry in Area 2C, combined with the delay in promulgating charter harvest restrictions. These factors made it difficult for managers to set harvest restrictions to avoid exceeding the GHL, while meeting the Council's objectives of avoiding in-season changes to harvest restrictions and maintaining a traditional season length. Until 2011, new charter halibut harvest restrictions were not implemented in time to prevent charter harvests from exceeding the GHL. As a result, the charter halibut fishery in Area 2C exceeded its GHL each year from 2004 through 2010. The CSP is not a punitive response to charter overharvest in Area 2C. The Council's rationale for the allocations for Area 2C is described in the preamble to the proposed rule and in section 1.6.7 of the Analysis.

Comment 19: Where in the analysis can we find graphical comparisons of the CSP and GHL allocations across their full range? Add a graphical comparison of the CSP and GHL, using the common measuring stick of logbook pounds, across the range of the CSP and GHL allocations, to show how much less the CSP allocation is than the GHL.

Response: NMFS has added a graphical comparison of the estimated CSP allocations to the GHL to section 2.5 of the Analysis as suggested by the commenter. Table 2–71 in section 2.8 of the Analysis presents estimates of charter and commercial catch limits if the CSP had been in place from 2008 through 2012. Based on the information in this table, the Area 2C CSP allocation to the charter sector would have averaged 662,000 lb and the GHL in these years averaged 845,000 lb. The Analysis estimates that the CSP allocation to the Area 2C charter sector would have averaged approximately 22 percent less than the GHL from 2008 through 2012. For Area 3A, the estimated CSP allocation to the charter sector would have averaged 3.3 million lb from 2008 through 2012 and the GHL in these years averaged 3.5 million lb. The Analysis estimates that the CSP allocation to the Area 3A charter sector would have averaged approximately 6 percent less than the GHL from 2008 through 2012. While this information was included in the Analysis that was available for public review before the proposed rule was published and was available for public comment during the comment period on the proposed rule, NMFS agrees with the commenter that a graphical representation of this information is useful to further illustrate the anticipated impacts of the CSP allocations. NMFS notes that section 2.5 of the Analysis presents a thorough comparison of the GHL with all of the allocation alternatives considered by the Council as it developed the CSP.

Comment 20: If the goal was allocations that float with abundance, how do you explain the flat spot in the Area 3A allocation between CCLs of 20 and 25 million lb?

Response: The ''flat spots'' or fixed poundage allocations will remove the vertical drops that would have occurred between allocation percentage tiers. The rationale for these allocation tiers is described in section 2.5.11 of the Analysis and the section entitled ''C. Annual Commercial Fishery and Charter Fishery Allocations'' of the proposed rule. Without this adjustment, a 1 lb increase in CCL could trigger a significant drop in the poundage allocated to the charter halibut fishery. For example, without the fixed poundage allocation between 20 and 25 million lb, if the Area 3A CCL were set at 19.9 million lb, the charter allocation would be 17.5 percent, or 3.5 million lb. If the CCL increased to 20 million lb, the charter allocation percentage would be 14.0 percent, or 2.8 million lb. By adding the fixed poundage allocation to the CSP, the vertical drop in charter sector allocation is removed. The Area 3A charter allocation would be fixed at 3.5 million lb until the CCL increases to the point where the charter allocation percentage at higher abundance levels would not result in a decrease in poundage allocated to the charter sector, in this example, at 25 million lb (see Figure 3 of this preamble).

The fixed poundage allocations were added in response to public comment on the CSP proposed rule published in 2011 (76 FR 44156, July 22, 2011), which noted the effects of the vertical drop resulting from the change in percentage allocations to the charter sector under the CSP. The Council also received testimony requesting revised CSP allocations that addressed the vertical drop in charter allocations. The fixed poundage allocations will benefit the charter sector by ensuring that the poundage allocation to the sector does not decrease over a specified range of CCLs.

Comment 21: What happens if the charter halibut harvest exceeds the CSP allocation? Where and how are overages in charter harvest accounted for?

Response: An overage by any sector in any given year does not affect other sectors in that same year. An overage by any sector affects all users in the subsequent year by increasing fishery removals that result in a lower estimated initial biomass. The IPHC assessment considers an overage as a removal higher than that fishery's catch limit. That higher removal in a fishing year means that biomass is incrementally lower at the end of that year than it would be otherwise. Underages have a similar effect on biomass but in the opposite direction, i.e., biomass estimation for the subsequent year begins at a higher level than it would otherwise, and all sectors will benefit from this.

Comment 22: The lower tiers of the new Area 3A CSP allocation are based on adding 3.5 percent of the CCLs to the 2011 CSP alternative. Why was 3.5 percent of the CCLs not added to the entire 2011 3A CSP alternative?

Response: As described in the response to Comment 5, in Area 3A, the percentage allocation to the charter sector at higher levels of abundance is based on the same formula used to calculate the GHL. While the Council considered increasing this allocation percentage to provide the Area 3A charter sector with a larger poundage allocation, the Council ultimately determined that a larger allocation would give more halibut to the charter fishery than it could harvest based on historical catch estimates and information on charter business operations received during the development of the CSP. The Council felt it was inappropriate to recommend a higher charter sector allocation that would likely not be harvested in the charter fishery.

Comment 23: As more fish are caught the CSP allocations for charter fisheries go down and the allocations for commercial fisheries go up. To shift the allocation away from the charter sector, which has only a small percentage of bycatch, to the commercial sector, which has higher rates of bycatch is not a sustainable solution. The allocation for both fisheries should go down as the amount of fish caught goes up.

Response: The allocations to the commercial and charter halibut sectors are not based on the amount of halibut caught. They result from apportionment of the CCL determined by the IPHC, after estimating the exploitable biomass, multiplying by a target harvest rate, and deducting other removals (e.g., unguided sport harvest, subsistence harvest). Figure 1 depicts how the CCLs and allocations will be calculated under the CSP.

As the CCL increases, the percentage allocated to the charter sector may decrease, but the pounds allocated to the charter sector will continue to increase. The Council determined that allocating a larger percentage to the charter halibut fishery at high abundances would allocate more pounds of halibut to the charter halibut fishery than they could harvest, based on available historic harvest data and information on charter business operations received during the development of the CSP (see section 1.6.7 of the Analysis for additional detail).

Comment 24: The current recommendation to give the underages of the charter fishing industry to the commercial fishing industry is unfair.

Response: The CSP does not allocate underages in the charter halibut fishery to the commercial halibut fishery. See Comment 21 for a description of how the IPHC accounts for underages and overages in the charter halibut fishery.

Comment 25: Underages in charter sector harvests should be available to be caught and sold by the charter fleet the same as commercial IFQ fish or added back to the allowable harvest for the following year.

Response: Commercial halibut fisheries are managed under the IFQ Program with individual allocations. IFQ management allows for underages of individual IFQ accounts to be carried forward to the QS holder's account in the following year, up to specified limits (see regulations at § 679.41). The charter fishery is not managed with individual allocations, so there is no mechanism to carry forward underages in that fishery as there is in the commercial fishery. As described in the response to Comment 21, underages will result in the halibut biomass estimation for the subsequent year beginning at a higher level, and all sectors will benefit from this.

Comment 26: The halibut resource should be split 50:50 between the commercial and sport sectors.

Response: The proposed rule for this action and section 1.6.7 of the Analysis describe the rationale for the allocations to the charter and commercial sectors under the CSP. The Council reviewed historical harvests as a proportion of estimated commercial and charter CCLs as well as recent harvests by each sector to establish the allocations under the CSP. NMFS notes that allocations among fishery user groups are commonly based on historical and recent harvests by each sector. NMFS has determined that the Council's decision to use historical and recent harvests in the Area 2C and 3A commercial and charter halibut fisheries provides a reasonable and logical basis for the CSP allocations implemented by this final rule. The commenter could propose different allocations to the commercial and charter sectors to the Council for future consideration.

Comment 27: The commercial halibut longliners were given more fish nearly every year than their initial allocation in 1995, while the GHL and daily bag limits were not increased for charter anglers.

Response: NMFS agrees that commercial catch limits in Area 2C and Area 3A have fluctuated relative to the catch limits established for 1995, the first year of the IFQ Program. However, since the implementation of the IFQ Program, the overall proportion of total halibut harvested in the Area 2C and Area 3A commercial halibut fishery has declined and the proportion harvested in the charter halibut fishery has increased. NMFS also agrees that the GHL was not responsive to changes in halibut abundance. As described in the response to Comment 1, one of the Council's primary objectives for the CSP is establish a comprehensive management program for the charter halibut fisheries in Area 2C and Area 3A, with sector allocations that balance the differing needs of the charter and commercial sectors over a wide range of halibut abundance and that also float with varying levels of halibut abundance. This final rule furthers that objective by establishing CSP allocations for the Area 2C and 3A commercial and charter halibut fisheries that vary with halibut abundance.

Comment 28: The real reason that commercial catch limits have been reduced in Areas 2C and 3A is the IPHC's switch to using a coastwide model in the stock assessment, not harvest overages by the charter sector.

Response: Overall, commercial catch limits have decreased with decreasing exploitable biomass. The Pacific halibut stock has been declining continuously over much of the last decade as a result of a number of factors, including decreasing size-at-age and poor recruitment strengths. This decline in abundance has been apparent coastwide in varying severity. Although the IPHC has shifted from area-specific stock assessments to a coastwide assessment, the mere shift in stock modeling does not account for the decreasing size-at-age and poor recruitment strengths. Catch overages by the charter fishery sector can result in a lower estimated initial biomass for all users and are incorporated into stock assessments, but are not the sole reason for reduced exploitable biomass and reduced commercial catch limits in Areas 2C and 3A.

Comment 29: The Council's Scientific and Statistical Committee in the analysis of the CSP said it believes that the magnitude and range of uncertainties concerning projections of charter harvests will prevent the charter harvest forecast accuracy from being within a range of 3.5 percent of the target allocation.

Response: This comment refers to the 3.5 percent target range proposed around the allocations in the 2011 proposed CSP. This target range was not included in the CSP implemented in this final rule and the comment is no longer applicable. The processes for projecting charter harvests and recommending any necessary management measures are described in the ''Catch Sharing Plan for Area 2C and Area 3A'' section of this preamble.

Comment 30: The proposed rule does not show a summary of the catch records for Charter Halibut Permits. Such data by area and how it compares to the commercial catch for each area would aid in setting the allocation for sport fishing.

Response: The Council considered historical and recent halibut catch data for the commercial and charter sectors in Areas 2C and 3A in its recommendation for the CSP (see sections 1.7.1.2 and 2.3.2.2 of the Analysis; see also the response to Comment 10).

Separate Accountability

Comment 31: Separate accountability is not needed for the charter halibut fishery because there is no halibut wastage in charter fishing.

Response: NMFS disagrees with the commenter's assertion that there is no halibut wastage (discard mortality) associated with the charter halibut fishery. As discussed on page 39135 of the proposed rule, wastage occurs in the charter halibut fishery as a result of stress or injuries sustained from hooking, hook removal, and handling of released fish. Wastage is the product of the number of fish released, the discard mortality rate, and the average weight of the released fish. Management measures, such as size limits, can affect the number and average weight of released fish and the resulting number of pounds of discard mortality. Separate accountability, the process of deducting wastage from each fishery sector's allocation, is described in the ''D. Calculation of Annual Fishery Catch Limits'' section of the preamble to the proposed rule.

Comment 32: The IFQ Program allows the commercial sector to highgrade (discard fish below a desired size) to deliver only most valuable fish to market. Legal size halibut caught early in the season are discarded to highgrade for larger fish that fetch a higher price. When the commercial fishery operated under the old derby system prior to the IFQ Program, all halibut caught went to market, resulting in less waste. The commercial sector should pay for all halibut it wastes.

Response: Federal regulations at § 679.7(f)(11) require that all legal-size halibut caught in the commercial fishery be retained until an individual's quota is reached. The extent to which highgrading may occur in the commercial fishery is unknown currently. Data from the recently implemented restructured observer program (77 FR 70062, November 21, 2012) may provide additional information in future years. Certain circumstances may encourage highgrading; however, the benefits of receiving a higher price by highgrading may not offset the added expense of fishing longer or taking additional trips to fully harvest one's halibut IFQ. The IPHC will use the best available information to estimate wastage by the commercial fishery and may incorporate data from the restructured observer program as they become available. Under the CSP, the commercial allocation will be reduced by an estimate of its wastage to obtain the annual commercial catch limit. Separate accountability for wastage promotes conservation by providing an incentive for commercial and charter sectors to reduce wastage, as wastage is deducted from each sector's allocations.

Comment 33: NMFS should address bycatch and wastage of the commercial fleet instead of limiting the charter fleet.

Response: As described in the proposed rule for the CSP and in section 2.5.5 of the Analysis, the commercial and charter halibut fisheries will be separately accountable for their discard mortality or ''wastage'' under the CSP. See also the response to Comment 32.

Comment 34: The CSP proposed rule provides for sector accountability of discard mortality (wastage) by deducting the projected wastage after each sector's allocation has been determined from the CCL. The IPHC endorses this approach and believes it is more equitable and appropriate than previous procedures. However, Figure 1 omits any mention of wastage by the unguided sport fishery. While outside the CSP, the IPHC will be looking to include an estimate of discard mortality for this sector, in addition to its estimated harvest, as part of ''Other Removals'' deducted from the Total CEY. The IPHC also concurs with the expectation that ADF&G will provide estimates of charter fishery wastage for each area.

Response: NMFS acknowledges the comment and the IPHC's plan to, in the future, include an estimate of unguided sport wastage in ''Other Removals.''

Comment 35: The Analysis on page 160, Table 2–32, uses proxy data for charter waste. Subsequent tables use the proxy data to estimate charter and commercial allocations under separate accountability. How can proxy data be used to incorporate separate accountability into the allocation decision? How did the Council factor separate accountability into the allocation decision without data on guided wastage and only partial data for commercial wastage?

Response: Proxy data were used in a modeling exercise to examine the effects on the commercial and charter catch limits of incorporating separate accountability into the allocations. Proxy data were used for the charter estimates of wastage because an estimate of wastage for that sector was not yet available. The use of proxy data allowed the Analysis to show the direction and approximate magnitude of changes in charter and commercial catch limits under separate accountability (Tables 2–33 and 2–34 of the Analysis). NMFS determined that the Council's decision to include separate accountability in the CSP is consistent with its program objectives and promotes conservation because it would encourage better handling of discarded fish to reduce the discard mortality rates and thus increase fishery catch limits.

Comment 36: Under separate accountability there will be a direct incentive to increase sector catches by decreasing sector discard mortality (wastage). Both sectors will want their reduced wastage to be assessed and incorporated into the calculations of catch limits. Are ongoing wastage surveys planned? We suggest managers consider options for achieving this goal.

Response: NMFS agrees that separate accountability will provide an incentive to reduce sector wastage to increase catch limits. Wastage estimates for each sector will be based upon the best available information. The IPHC estimates wastage in the commercial fishery from data gathered during its fishery surveys. The IPHC may incorporate observer data to improve this estimate in future years. Estimates of charter sector wastage will, in part, depend on the management measures in place. As noted in section 2.5.5 of the Analysis, implementation of size limits may have an effect on discard mortality estimates for the charter sector because wastage in the charter fishery is a function of the number of fish released. Additional fishery surveys or research on wastage in the commercial and charter sector may be developed after reviewing current data, and forthcoming data from the restructured observer program.

Comment 37: The final rule should broaden the responsibility for wastage estimates so that ADF&G, the IPHC, or NMFS could provide them.

Response: The Council recommended that the IPHC deduct an estimate of wastage for each sector's allocation to calculate their annual catch limits. The CSP does not specify who will estimate wastage or how it will be estimated. The IPHC currently estimates wastage for the commercial fishery. NMFS anticipates that ADF&G will provide wastage estimates for the charter fishery because ADF&G has been collecting data on the numbers of halibut kept and released through their saltwater charter logbooks, statewide harvest survey, and creel surveys.

Comment 38: The only study of released fish mortality of Pacific halibut was conducted in 1958–1960 and used only J-hooks. This study estimated the release mortality of halibut at 3.8 percent; however, guided and commercial wastage depend on a variety of factors such as hook type, abundance, harvest rules, and weather.

Response: NMFS believes that the comment refers to a 1969 report to the IPHC by G. J. Peltonen on the viability of tagged Pacific halibut (*www.iphc.int/publications/scirep/Report0052.pdf*). This study demonstrates the difficulties in determining mortality in large species like Pacific halibut because the captured fish are usually held for long periods to determine survival, and the conditions in the unnatural environment in which the fish are held confound the results. The report concluded that there is a mortality rate of 2 to 5 percent for fish released in excellent condition. The midpoint of this range (3.5 percent) is the basis of the discard mortality rate that the IPHC currently applies to commercially caught halibut released in excellent condition.

NMFS agrees that discard mortality rates are influenced by a variety of factors and notes that the IPHC uses the best available information from studies on halibut and other species to develop discard mortality rates. The IPHC considers the findings of several studies, including mark-recapture studies, that examine mortality rates associated with a variety of factors such as hook type and size, handling, water temperature, and longline soak times, to develop discard mortality rates for halibut released with minor, moderate, or severe injuries. Similarly, estimates of discard mortality in the charter fishery will be based on the best available information. See Meyer (2007) for a discussion of some of the factors that may be incorporated into wastage estimates for the charter fishery (*http://alaskafisheries.noaa.gov/npfmc/PDFdocuments/halibut/HalibutDiscards907.pdf*).

Comment 39: How is separate accountability for GAF calculated and from which sector's allocation will this wastage be deducted?

Response: ADF&G requires that charter vessel guides record the number of halibut kept and the number released in the saltwater charter logbook. Under the CSP, guides will also be required to record in the logbook the number of GAF harvested. The number of halibut released in pursuit of GAF will not be differentiated from the number of halibut released in pursuit of non-GAF halibut kept by charter vessel anglers. Therefore, there will not be a wastage estimate specifically for GAF; only a single wastage estimate for all halibut kept and released in the charter halibut fishery. Charter halibut wastage will be deducted from the charter sector's allocation to obtain the charter catch limit.

Guided Angler Fish (GAF)

Comment 40: GAF will not work with most charter fishing business models. Charter anglers will not want to purchase GAF and commercial QS holders will not lease IFQ as GAF at a reasonable price. There are too many problems with the proposed GAF program for implementation at this time.

Response: The Council recommended GAF as part of the CSP to provide an opportunity for the charter halibut fisheries in Area 2C and Area 3A to increase fishing opportunities when the charter allocation may be constraining. The Council recommended GAF after considering a number of alternative mechanisms for transferring halibut allocation from the commercial sector to the charter sector. The Council also recognized that some charter operators may choose not to use the GAF provision as part of their business plans (see sections 1.6.7 and 1.6.8 of the Analysis).

The Council's Charter Halibut Stakeholder Committee recommended GAF as its preferred method for providing the charter sector with access to additional halibut under a potentially constraining CSP allocation. During development of the CSP, the Council received public testimony in support of the GAF Program from stakeholders who participate in the commercial and charter halibut fisheries. The Council also received testimony from charter sector representatives expressing concern regarding the commercial sector's willingness to lease halibut IFQ to charter operators. They noted a variety of reasons for their concern, including tensions that exist between the participants in the commercial and charter sectors in Areas 2C and 3A, potentially insufficient halibut IFQ available for lease, potentially insufficient capital among smaller charter operations to lease IFQ, and uncertainty regarding the willingness of clients to pay for the opportunity to retain GAF. The Council also heard testimony from several commercial halibut QS holders indicating that they would be willing to lease halibut IFQ to the charter sector (see section 2.5.12 of the Analysis and the response to Comment 54). Finally, NMFS notes that charter businesses in Area 2C have expressed an interest in leasing GAF to augment the one-fish bag limit currently in place for guided anglers. Based on this information, the Council determined, and NMFS agrees, it is likely that some IFQ will be made available for lease to charter operators under the GAF program.

NMFS anticipates the Council will review the GAF program in the future to assess its effectiveness at providing anglers with additional opportunities for retaining halibut in the charter fisheries. This review likely will be based on data NMFS collects on transfers of IFQ to GAF and on returns of unused GAF to halibut IFQ holders. NMFS also anticipates that the Council will receive feedback from commercial and charter halibut fishery participants who use GAF. The Council may consider revisions to the GAF program based on its review of GAF use and on input from stakeholders.

Comment 41: I support GAF. It is a first step towards a fair compensated market-based reallocation between sectors.

Response: NMFS acknowledges the comment. See also response to Comment 7.

Comment 42: The CSP is punitive as it forces recreational anglers to purchase additional halibut from quota already assigned to the commercial sector. It is not fair to require recreational anglers to buy the right to catch additional fish from the commercial sector.

Response: Charter vessel anglers are not required to purchase GAF, nor is the GAF program punitive. Use of GAF is optional for charter vessel anglers who wish to retain more fish than allowed under the bag limit in effect for charter vessel anglers, up to the limit in place for unguided anglers. The GAF program is an authorized additional use of halibut IFQ that will provide IFQ holders, charter guides, and charter anglers more flexibility, while maintaining total harvests within the targets set by the IPHC. See also response to Comment 2, Comment 7, and Comment 40.

Comment 43: Instead of GAF, why not just allocate more halibut to the charter sector?

Response: The GAF provision was intended to provide charter vessel anglers additional harvest opportunities during years of low abundance when guided anglers are limited to fewer or smaller fish than unguided anglers under the CSP allocation of halibut to the charter sector (see response to Comment 7). The rationale for the specific allocation provided to the charter and commercial sectors is described in detail in the preamble to the proposed rule and summarized in the preamble for this final rule.

Comment 44: Is GAF a fish or a fishing opportunity? A GAF will be sold if and only if a fish is landed; at that point it is a fish. Why would a charter operator sell a GAF if no fish was harvested? Why would a guided angler buy a GAF if no fish is landed?

Response: A GAF is a fish. Regulations at § 300.61 of this final rule define GAF as halibut transferred within a year from an Area 2C or Area 3A IFQ permit holder to a GAF permit that is issued to a person holding a charter halibut permit for the corresponding IPHC regulatory area. A GAF permit authorizes a charter vessel angler to retain GAF in the IPHC regulatory area specified on a GAF permit during a charter vessel fishing trip authorized by the charter halibut permit. GAF are not debited from a GAF permit holder's account unless a halibut is caught, retained, marked, measured, recorded, and electronically reported as required by regulations at § 300.65(c)(5) and § 300.65(d).

NMFS agrees that the market-based nature of IFQ to GAF transfers makes it likely that some or all of the cost of obtaining GAF will be borne by the charter vessel anglers using GAF. The GAF permit holder decides how he or she would like to offer charter vessel anglers the opportunity to retain GAF. A charter fishing trip is an opportunity to catch fish, but not a guarantee that a certain number or size of fish will be caught, and anglers do not always catch their bag limit on every trip. The GAF permit holder and charter vessel anglers will be able to decide how to distribute the cost and opportunity for using GAF. Although some charter operators may offer GAF to an individual charter vessel angler at the time a halibut is caught, NMFS anticipates that some charter operators may choose to spread the cost of leasing GAF from IFQ holders across all charter vessel anglers who use their services. If this is the GAF permit holder's business model, then the cost of charter vessel fishing trip with that operator may increase for all anglers, including those who do not retain GAF. See also response to Comment 63.

Comment 45: How much GAF will cost and will the cost vary among charter operators? What is the basis for GAF prices and will the price for GAF vary annually?

Response: Section 2.5.12 of the Analysis notes that the number of GAF transactions and the prices for those transactions will be determined by the supply of and demand for GAF. Because the market price for GAF will be determined by the value of halibut in the directed commercial fishery and charter vessel anglers' willingness to pay higher prices for trips that allow greater harvest flexibility by using GAF, it is not possible to estimate the cost of GAF to charter vessel anglers in Area 2C or Area 3A. NMFS anticipates that because there are a number of different types of charter operations in Areas 2C and 3A, the demand for, and cost of, leasing IFQ as GAF will vary among charter operators. NMFS also anticipates that the cost of GAF to charter vessel anglers will vary annually because it will depend on a number of factors, including the supply of halibut IFQ for lease as GAF, the demand for GAF, the average weight of GAF used to convert pounds of IFQ to number of GAF, and the charter harvest management measures in place that year.

In determining whether to lease IFQ as GAF, most individual charter operations will need to consider whether anglers using its services are willing to pay increased prices for using GAF. Charter operations attracting anglers willing to pay an increased cost for the experience of harvesting more or larger fish will be more likely to utilize GAF. Those charter operations that do not attract such anglers will be less likely to participate in the GAF program. In the same way, charter vessel anglers will need to determine if the opportunity to harvest more or larger halibut is worth the increased cost.

Comment 46: How much will it cost to lease GAF? How will CHP holders find IFQ to lease as GAF? Is it possible that some charter businesses will be discriminated against and denied the opportunity to lease GAF?

Response: Section 2.5.12 of the Analysis describes that the lack of cost data associated with the commercial and charter operations and the difficulty of projecting GAF supply and demand limits the Council and NMFS' ability to provide detailed estimates of the quantity and lease price for transfers between IFQ and GAF. The Analysis provides a discussion of the factors affecting the supply of GAF and a qualitative assessment of which types of IFQ holders may be more likely to lease IFQ as GAF. An IFQ holder's willingness to lease IFQ as GAF could be affected by factors such as quantity and distribution of IFQ holdings across regulatory areas, costs associated with harvesting their IFQ holdings in the commercial fishery, relationships with participants in the charter sector, agreements with processors, or enjoyment derived from fishing. NMFS anticipates that each IFQ holder will employ his or her own criteria when determining whether to lease some or all of available IFQ to the charter sector.

NMFS expects that halibut IFQ will be available for lease as GAF to charter operators in a variety of ways. Some CHP holders hold or may be eligible to purchase their own halibut QS, which yields annual IFQ that they may transfer and use in the charter fishery. Transfers of IFQ to GAF may be agreed upon directly between halibut QS holders and CHP holders, or brokers who currently facilitate transfers of halibut IFQ and charter halibut permits may act as intermediaries in transactions. Brokers may also help willing QS holders find CHP holders, and vice-versa.

Given the market-based nature of the GAF program, the Council and NMFS cannot guarantee that a charter operator seeking to lease IFQ as GAF will be able to enter into an agreement with one or more IFQ holders to obtain the amount of GAF he or she would like to use. However, section 2.5.12 of the Analysis notes that a mutually beneficial agreement must be reached before a lease from IFQ to GAF will occur; therefore, the Council and NMFS believe that neither the charter operator nor the IFQ holder possesses sufficient market power to force the other into a lease agreement. As described in the response to Comment 7, the GAF program was not intended to provide a mechanism to replace reductions in the charter allocation relative to current or historical harvest levels. See also response to Comment 50.

Comment 47: The uncertainty in how many GAF will be available each year will make it difficult for charter businesses to develop business and marketing plans.

Response: NMFS agrees that there will be some uncertainty in how many GAF will be available for lease each year and how much demand there will be for GAF. Whether IFQ is leased to members of the charter sector depends on several factors. As discussed in the response to Comment 45 and Comment 46, these factors occur on both the demand side (CHP holders' ability to forecast angler demand, the charter management measures in place for that year, and angler willingness to purchase GAF) and on the supply side (IFQ holders' willingness to lease their halibut IFQ holdings as GAF). Both the supply and demand sides are equally important, because a mutually beneficial agreement must be reached before a lease will occur. Additional factors affecting the supply of and demand for GAF are discussed in the Analysis in sections 2.5.12.2 and 2.5.12.3, respectively.

While NMFS acknowledges that there will be some uncertainty from year to year regarding the supply of and demand for GAF, annual charter management measures under the CSP will be established the beginning of the year and are not changed for the remainder of that fishing year. Therefore, CHP holders and halibut IFQ holders will know early in the fishing season if there is a need for charter operators to lease GAF to provide anglers with additional opportunities to harvest halibut in the charter fishery.

Comment 48: Just as commercial halibut fishermen have invested in quota shares, charter halibut permit holders may invest in commercial halibut QS to offer their clients as GAF.

Response: NMFS agrees that one way in which some charter halibut permit holders may control the cost of using GAF for charter vessel anglers is to purchase commercial QS and transfer the IFQ resulting from that QS for use as GAF. Some charter halibut permit holders already hold commercial halibut QS and could use this method for obtaining GAF. However, NMFS notes that some charter operators in Area 2C and Area 3A would still need to meet all requirements to be eligible to hold halibut QS. For example, regulations at § 679.41(d) generally specify that only persons with 150 days or more of experience working as an IFQ crewmember are eligible to hold halibut QS.

Comment 49: Commercial fishermen are allowed to carry over to the following season up to 10 percent of their annual allocation. One way that commercial and charter operators could structure GAF contractual agreements is to allow this 10 percent to be contractually held in reserve for a charter operator to use as needed over the course of the season. Any unused portion will be automatically returned to the IFQ holder by NMFS at the end of the season, and any used portion will be paid for at an agreed upon rate.

Response: NMFS acknowledges the comment and expects that commercial and charter operators will develop a variety of arrangements, possibly including the one described by this commenter, when negotiating contracts for the lease of IFQ as GAF. NMFS notes that there are commercial quota share holders who will likely be willing to lease IFQ as GAF. See also response to Comment 46.

Comment 50: Current ''hired skipper'' and leasing arrangements in the IFQ fishery suggest that the likely GAF lease rate will be approximately 50 percent of the ex-vessel per pound value of the QS from which the IFQ is derived. Since the average size halibut in the charter fishery is 20 lb and the current average ex-vessel price is $4.50/lb, a charter operator could expect to pay approximately $45 per GAF.

Response: NMFS acknowledges the comment. NMFS received numerous comments on the CSP proposed rule estimating that GAF will cost between $100 and $200, and expressing concerns that GAF will be cost prohibitive for many charter businesses and anglers. Predicting the specific cost for GAF in Area 2C or 3A is not possible as described in response to Comment 46. NMFS notes that a price closer to $45 per GAF could make GAF use more affordable and desirable for charter operators and charter vessel anglers.

Comment 51: The GAF program conflicts with the prohibition on leasing in IFQ regulations and works against the IFQ Program's goal of having an owner-onboard fishery. The option to lease IFQ as GAF will encourage absentee IFQ holders in the commercial fleet.

Response: The response to Comment 7 describes the Council's rationale for recommending the GAF program to provide a mechanism for transfer between the commercial and charter halibut sectors in Areas 2C and 3A. As discussed in the ''D. GAF Transfer Restrictions'' section of the preamble to the proposed rule, the Council intended for the GAF program to provide IFQ holders some flexibility in how they use their IFQ, with limitations. In recommending the restrictions on the amount of IFQ that an IFQ holder may transfer as GAF, the Council considered IFQ Program objectives to promote an owner-onboard fishery for certain types of halibut QS holdings. NMFS believes that the GAF transfer restrictions implemented by this final rule appropriately balance the Council's objective to provide the charter sector with access to additional halibut under a potentially constraining CSP allocation with its objectives for the IFQ Program.

Comment 52: The charter fishery representatives who initially proposed the GAF program insisted that GAF be for lease only.

Response: Section 1.6.8 of the Analysis describes that in developing the CSP, the Council also considered and rejected an alternative that would have allowed CHP holders to transfer (i.e., purchase) commercial halibut QS, rather than leasing IFQ, because the proposal was not supported by the charter halibut sector. As described in the response to Comment 40, the Council's Charter Halibut Stakeholder Committee recommended GAF as its preferred method for providing the charter sector with access to additional halibut under a potentially constraining CSP allocation. The final proposal from the committee to the Council only contained an annual transfer of IFQ (lease) option, not an option for charter operators to purchase QS for permanent use in the charter fishery. However, as noted in the response to Comment 48, charter operators who are eligible to receive QS by transfer may purchase QS for Areas 2C and 3A and use the resulting IFQ for GAF.

Comment 53: Any transfer of IFQ from the commercial sector to the charter sector should be accommodated through an arrangement that allows the charter fleet to purchase QS, not lease, IFQ for use in a common pool to permanently supplement the baseline charter allocation.

Response: The option for the charter sector to purchase quota share to augment the charter allocation was not among the alternatives considered by the Council. See response to Comment 52 and Comment 152.

Comment 54: Some commercial operators in support of the GAF program would prefer that sector allocations be allowed to be transferred both ways. They note that no charter operator or angler will be forced to use GAF, and that their association has members who are willing to work with local charter operators to use the GAF program.

Response: NMFS notes the support for the GAF program and willingness to participate by some commercial IFQ holders. As discussed in the response to Comment 40, NMFS anticipates the Council will review the GAF program in the future and may consider revising the program based on its use and on input from stakeholders.

Comment 55: What measures will determine the success or failure of the GAF provision?

Response: The Council and NMFS will review a range of factors such as amount of use, cost, and input from commercial and charter operators when reviewing the use of GAF and any potential revisions. The responses to Comment 45 and Comment 46 describe that the quantity and cost of GAF used will depend on a number of factors that affect the supply of and demand for GAF. While the Council and NMFS cannot estimate how much GAF will be used in the charter halibut fisheries with available information, input from fishery participants to the Council during development of the CSP and in comments received on the CSP proposed rule indicate that some IFQ will be leased as GAF and used in the charter halibut fisheries.

Comment 56: Does NMFS expect anglers who harvest smaller than average GAF to pay for those who harvest larger than average GAF?

Response: The proposed rule for the CSP describes that NMFS issues halibut IFQ in pounds and will issue GAF in numbers of fish. The conversion factor from IFQ pounds to number of fish for GAF will be based on the average weight of GAF from the previous year as estimated from GAF length data reported to NMFS through the electronic GAF reporting system (see ''F. GAF Reporting Requirements'' section of the proposed rule and regulations at § 300.65(c)(5)(ii)(E)) implemented by this final rule. For example, if a charter permit holder requested, and NMFS approved, a transfer of 5 GAF and the conversion factor for that area was 20.7 lb (9.4 kg), then 104 lb (47.2 kg) of IFQ would be debited from the IFQ holder's account for that area as follows: 5 GAF × 20.7 lb = 103.5 lb (46.9 kg) and rounded up to 104 lb (47.2 kg).

NMFS acknowledges that the sizes of retained GAF will vary around the average weight estimate for GAF in each area. Section 2.5.12.1 of the analysis describes that charter vessel anglers who harvest GAF that are larger than the average GAF weight used to convert IFQ to GAF may benefit relative to anglers who harvest smaller than the average GAF weight. The Council and NMFS considered this information and determined that using the average weight of GAF from the previous year as reported to NMFS to convert IFQ pounds to number of GAF is consistent with the Council's objective to provide an effective mechanism for transferring halibut from the commercial to the charter sector. This approach minimizes changes to operating practices in each fishery and to the existing recordkeeping and reporting system for the IFQ Program.

The Council considered issuing GAF in pounds rather than fish, but CHP holders would then be limited by GAF transfer restrictions to different numbers of GAF based on their area, fishing practices, and results. Section 2.5.12.1 of the Analysis describes the effects of issuing GAF in pounds rather than in numbers of fish. In 2010 ADF&G estimated the average weight of sport caught halibut landed at the Prince of Wales Island port to be 14.8 lb, while sport caught halibut landed at the Glacier Bay port averaged 47.4 lb. If GAF were issued in pounds, a CHP operator in the Prince of Wales Island area would be eligible under GAF transfer restrictions to lease GAF to harvest 3.2 times as many fish as the person operating in Glacier Bay. Additionally, charter operators offer charter vessel anglers the opportunity to harvest a certain number of fish, not a certain poundage of fish. Issuing GAF in pounds would require charter operators wishing to lease IFQ as GAF to estimate the number of pounds of halibut to lease rather than the number of halibut, which could potentially be challenging to determine in advance. For these reasons, NMFS and the Council determined that numbers of fish was the more appropriate unit in which to issue GAF.

NMFS will not participate in price negotiations for GAF, as NMFS considers those negotiations to be private, voluntary, market-based transactions between charter operators who hold GAF and charter vessel anglers using their services. NFMS anticipates that charter operators could use different pricing methods to accommodate different sizes of retained GAF. Some operators may choose to charge anglers per GAF, and could adjust the price depending on the size of the GAF. Some charter operators may choose to spread the cost of leasing GAF from IFQ holders across all charter vessel anglers, particularly those operators affiliated with lodges that offer charter vessel fishing trips as part of an overall package of services.

Comment 57: The CSP uses the previous year's estimate of GAF average weight to convert IFQ pounds to numbers of GAF. GAF harvest (in pounds) is counted toward the individual quota of the IFQ holder that leased the fish. The weight of each GAF harvested by charter clients can be estimated from length data reported in the electronic reporting system as described on page 39150 of the proposed rule. If the estimated average weight of GAF harvest exceeds or is less than the previous year's average weight used to convert IFQ to GAF, the actual harvest will represent an overage or underage of IFQ. Since the actual weight can be estimated, we suggest NMFS provide estimates of the actual weights of GAF to the IPHC for stock assessment purposes (e.g., accounting for annual removals).

Response: NMFS agrees and will provide these data to the IPHC to incorporate into its annual stock assessments.

Comment 58: In any given year, if the actual GAF poundage harvested exceeds the IFQ poundage converted to GAF, who pays for the excess harvest? In other words, how is GAF overharvest accounted for?

Response: The factor for converting IFQ pounds to number of GAF is the average weight of GAF from the previous year reported by charter operators in the GAF electronic reporting system. NMFS anticipates that the estimated weight in pounds of all GAF retained and reported in the electronic reporting system will not vary significantly from the number of pounds converted from IFQ to GAF for that year and deducted from IFQ account holders because some GAF will be larger and some will be smaller than the average GAF weight used as the conversion factor. Nevertheless, as described in the response to Comment 57, NMFS intends to annually provide the IPHC with estimates of GAF weights for Area 2C and Area 3A based on reported GAF length. NMFS anticipates the IPHC will use these data in its stock assessment for the following year to account for any differences between converted GAF weight deducted from IFQ accounts and estimated GAF weight reported to NMFS in the previous year. Such differences will affect the halibut biomass estimate for the next year, but will not be explicitly added or subtracted from the next year's catch limits for either sector. This is the same approach the IPHC will use to account for charter harvests that exceed or are less than the charter sector's catch limits under the CSP (see response to Comment 21).

Comment 59: ''IFQ pounds'' for halibut is defined as net weight, i.e., without gills and entrails, head-off, washed, and without ice and slime. It would make the CSP more consistent with other halibut regulations if the definition of ''net weight'' was included. In the description for the transfer between IFQ and GAF (page 39138 of the proposed rule) the text is somewhat confusing, as it states ''the equivalent number of net pounds of halibut rounded up to the nearest whole net pound.''

Response: No change was made from the proposed rule. ''Net weight'' is defined at § 679.2 to mean the weight of a halibut that is gutted, head-off, and washed or ice and slime deducted. The method of rounding net weights to the nearest whole pound results in the fewest conversion errors when GAF are converted back to IFQ, as explained in the proposed rule and section 2.5.12.4 of the Analysis.

Comment 60: What prevents someone who holds both commercial QS and a charter halibut permit (CHP) from transferring IFQ to GAF on his CHP and then selling GAF, which when harvested greatly exceed the average poundage used to create the GAF? The above example would amount to NMFS-sanctioned overharvest of the holder's IFQ. Where is the individual accountability in the above example?

Response: NMFS expects that the average size of harvested GAF will be close to the average used for the conversion factor to convert from pounds of IFQ to number of GAF. The GAF conversion factor will be recalculated annually based on the average size of GAF retained and reported to NMFS during the previous season. Quota share holders who also hold CHPs will be subject to the same reporting requirements and transfer limits as other halibut QS and CHP holders. NMFS will report the lengths and estimated weights of GAF harvested to the IPHC so any differences between converted GAF weight deducted from IFQ accounts and estimated GAF weight reported to NMFS may be incorporated into the following year's stock assessment (see also response to Comment 57).

Comment 61: The average weight of a charter-caught halibut in Area 3A was 15.2 lb in 2011. The average size in the Glacier Bay subarea of Area 3A was 35.9 lb. If GAF are created using the average fish size, it is much more likely that they will be used in subareas with larger than average fish sizes like Glacier Bay and Yakutat to maximize GAF ''bang for the buck.''

Response: According to the report cited by the commenter (*http://alaskafisheries.noaa.gov/npfmc/pdfdocuments/halibut/2c3a_adfg2011estimates0912.pdf*), of the 184,293 fish harvested by charter vessel anglers in Area 3A in 2011, only 601 of those fish (0.3 percent) were harvested in the Glacier Bay subarea. The Yakutat subarea is the subarea closest to Glacier Bay in Area 3A. Combining the Glacier Bay and Yakutat subareas only accounts for 2 percent of the total number of fish harvested in Area 3A. GAF may be used in these areas, but its use is likely limited given the relatively small amount of harvests in these areas. The Glacier Bay and Yakutat subareas are far removed from the main charter fishing communities of the Kenai Peninsula and Prince William Sound. It is unlikely that charter operators would travel hundreds of miles from the northern Gulf of Alaska to Glacier Bay or Yakutat to maximize the size of fish harvested for each GAF given the costs of fuel, time required for transit, and difficulty in obtaining clientele in those locations. Charter operators using GAF in Glacier Bay and Yakutat could benefit from the use of average weight in Area 3A when determining the amount of IFQ required for each GAF. The use of average weight by IPHC regulatory area for GAF could be reviewed by the Council and NMFS, and revisions could be incorporated in a future action, if warranted.

Comment 62: A charter vessel angler should be able to buy as many GAF as he or she would like to catch if the angler is willing and able to pay for GAF.

Response: See the response to Comment 64 for a description of the limits on GAF use for guided anglers. GAF is intended to allow CHP holders to provide charter vessel anglers with halibut harvest opportunities that are equivalent to, but not more than, those provided to unguided anglers (see section 2.5.12.7 of Analysis). In recommending GAF use limits, the Council balanced its objective to provide an opportunity for the charter halibut fisheries in Area 2C and Area 3A to increase fishing opportunities when the charter allocation may be constrained with its objective to stabilize the proportions of harvestable halibut available to the commercial and charter fisheries at all levels of halibut abundance.

NMFS notes that the Council's recommendation of GAF use limits for charter vessel anglers is also consistent with the Halibut Act requirement that allocations of fishing privileges must be carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of halibut fishing privileges (Halibut Act, at 16 U.S.C. 773c(c)). A charter vessel angler may purchase GAF for use over several days if he or she wishes to retain multiple daily bag limits.

Comment 63: When does a GAF become a sport caught fish, before or after it has been landed? Selling or purchasing sport caught fish is illegal.

Response: Halibut IFQ becomes GAF when NMFS approves a transfer between an IFQ permit holder and a charter halibut permit holder. As described in the response to Comment 44, regulations at § 300.61 of this final rule define GAF as halibut transferred within a year from an Area 2C or Area 3A IFQ permit holder to a GAF permit that is issued to a person holding a charter halibut permit for the corresponding area. A GAF permit authorizes a charter vessel angler to retain GAF in the IPHC regulatory area specified on a GAF permit during a charter vessel fishing trip authorized by the charter halibut permit. When a GAF is retained by a charter vessel angler, it will be recorded in the saltwater charter logbook and on the GAF permit log as GAF harvested, but will not accrue toward charter harvest because GAF is a use of IFQ and has been deducted from the IFQ permit holder's account. However, because GAF is harvested in the charter halibut fishery, the charter vessel angler harvesting GAF must comply with all applicable sport fishing regulations. When a charter vessel angler retains GAF, the angler is not buying a sport-caught fish from the charter operator because it was never the charter operator's fish to sell. The charter vessel angler is allowed to retain GAF under authority of the charter halibut permit holder's GAF permit, as long as all applicable reporting and marking requirements are met (see regulations at § 300.65(c)(5) and § 300.65(d)). NMFS acknowledges that charter operators are likely to charge charter vessel anglers retaining GAF a fee in order to recover the costs of leasing GAF from halibut QS holders (see response to Comment 44). Any fee paid to the charter operator by the charter vessel angler represents purchase of a federally authorized privilege of retaining a sport-caught halibut in addition to that allowed under charter size or bag limit restrictions in place at the time. Current prohibitions on selling sport-caught fish are not modified by this final rule. Sale, trade, or barter of all sport-caught halibut by a charter vessel angler is prohibited under State of Alaska regulations and section 25(6) of the IPHC annual management measures.

Comment 64: If I am fishing in an area that has a one-fish bag limit with a reverse slot limit (e.g., Area 2C), does the second fish have to meet the regulations of the one-fish bag limit, or can the second fish be of any size? If I am fishing in an area that has a limit for charter vessel anglers of two fish per day with a size limit on one of those fish, would GAF be required if the first fish caught was over the limit and the second fish was under the size limit? In this same scenario, what would prevent trading of fish on the deck of the charter vessel to circumvent restrictions on the second fish? And what is to stop anglers from swapping fish to make sure GAF provisions are not needed for any of the anglers on the boat?

Response: As stated on page 39136 of the proposed rule, charter vessel anglers may use GAF to retain halibut up to the limit for unguided anglers when the charter management measure in place would limit charter vessel anglers to a more restrictive harvest limit. In other words, a charter vessel angler may retain a halibut as GAF that exceeds the daily bag limit and length restrictions in place for charter anglers only to the extent that the angler's halibut retained under the charter halibut management measure plus halibut retained as GAF do not exceed daily bag limit and length restrictions imposed on unguided anglers. How GAF may be used depends on the charter management measures and the measures in place for unguided anglers.

In the first scenario above and assuming an unguided daily bag limit of two fish of any size, a charter vessel angler could keep one halibut under the reverse slot limit and use one GAF to keep a second halibut of any size, or could use two GAF to keep two halibut of any size in a day. In the second scenario, the angler would not need to use GAF. If the charter vessel angler wanted to keep two fish over the size limit, one GAF could be used. Table 5 of the proposed rule gives additional examples of potential GAF uses.

Trading fish among anglers on the deck of a charter vessel to circumvent bag limits and GAF use requirements would be a violation of IPHC annual management measures. Paragraph 25(3) states that ''any halibut brought aboard a vessel and not immediately returned to the sea with a minimum of injury will be included in the daily bag limit of the person catching the halibut'' (78 FR 16423, March 15, 2013). Plainly stated, a fish belongs to the person who caught it and applies toward that person's daily bag limit.

Comment 65: Suppose a charter operator buys a large vessel, stacks multiple CHPs on it, and buys GAF for resale to customers. With GAF assigned to individual CHPs, he could easily find himself holding plenty of GAF but unable to sell it because the angler wanting to buy the GAF is fishing on a stacked CHP with no associated GAF. How is this situation handled under the CSP? It would make sense to assign GAF to a CHP holder that can be used on any CHP the holder may control.

Response: The comment refers to § 300.65(c)(5)(iii)(A)(*4*) of this final rule, which specifies that a GAF permit is assigned to only one CHP held by the GAF permit holder. Charter halibut permit holders requesting GAF will be required to specify the CHP to which the GAF permit would be assigned on the application for transfer between IFQ and GAF. The assignment between a GAF permit and a CHP could not be changed during the year. NMFS is implementing this requirement to facilitate enforcement and recordkeeping and reporting for GAF.

As described in the proposed rule for the CSP, GAF permit holders will be required to hold a sufficient number of GAF for charter vessel anglers to retain halibut in excess of the charter angler limit and up to limits in place for the unguided sport halibut fishery for that area. In other words, charter operators will be required to already possess the GAF prior to the fish being caught. GAF could not be obtained after the angler retained a fish. GAF permit holders who do not hold sufficient GAF to cover retained halibut by charter vessel anglers in excess of the CSP restriction may not allow anglers to retain those GAF. The charter operator will be required to have the GAF permit and the CHP to which it is assigned on board the vessel on which a charter vessel angler retains GAF, and to present the permits if requested by an authorized enforcement officer (see regulations at § 300.65(c)(5)(iv)(A) and (B) and § 300.65(c)(5)(iii)(A)(*5*)). NMFS believes that these requirements are necessary to enable enforcement personnel to verify that all charter anglers on board catching and retaining halibut are authorized to do so by the CHP and GAF permits on board the vessel.

Allowing CHP holders to use a GAF permit in conjunction with any CHP on board the vessel, as suggested by the commenter, could make it difficult for enforcement officers to verify that the CHP and GAF permits are valid and all anglers are authorized to retain the halibut included in their daily bag limit. This is particularly likely if multiple CHPs are used on the same vessel or if the vessel operator is not the CHP holder. NMFS also believes that requiring a GAF permit to be assigned to only one CHP held by the GAF permit holder will facilitate GAF recordkeeping and reporting for CHP and GAF permit holders. Because GAF permit holders must have sufficient GAF on their permit prior to the charter vessel fishing trip to cover GAF retained, assigning one GAF permit per CHP will assist the holder with GAF account tracking and reporting in the ADF&G saltwater charter logbook and in the GAF electronic reporting system (see regulations at § 300.65(d)(4)(ii)(B) and § 300.65(d)(4)(iii)). It will be up to the CHP holder to decide how best to distribute GAF and charter vessel anglers among permits to ensure that GAF is available when necessary.

Comment 66: Why are GAF assigned to an individual charter halibut permit and not to the person who holds the CHP? How can someone who rents a CHP use GAF on the rented CHP?

Response: GAF are assigned to an individual CHP and not the CHP holder because the CHP holder is not necessarily the guide on board the charter vessel using the CHP. A person may hold multiple CHPs that are used on more than one vessel. Just as a CHP holder may allow someone else to use their CHP on a charter vessel fishing trip, he or she may receive a transfer of IFQ as GAF and also let the person using the CHP use the GAF permit assigned to that CHP. See also response to Comment 65.

Comment 67: GAF benefits larger charter operations who can amortize the expense of leased halibut over a large customer base to gain a competitive advantage over smaller operators whose small client base does not support such expenditure.

Response: The Council recommended, and this final rule implements, GAF transfer limits (also called ''use caps'') on the number of GAF that a CHP holder may receive as well as the amount of IFQ that a halibut QS holder may transfer as GAF. The Council recommended different GAF limits for CHPs with different numbers of angler endorsements to balance the GAF needs of different types of charter operations with its objective to maximize the opportunity for all charter operators to acquire GAF. Because holders of CHPs endorsed for more than six anglers are likely to be larger charter operations, the Council was concerned that these larger charter operations would have more financial resources to acquire GAF than smaller operations unless limits were established. These transfer limits are intended to prevent an entity from obtaining an excessive share of the GAF fishing privileges.

IFQ holders in Area 2C will be limited to transferring up to 1,500 lb (680.4 kg) or 10 percent, whichever is greater, of their initially issued annual halibut IFQ for use as GAF. In Area 3A, IFQ holders can transfer up to 1,500 lb or 15 percent, whichever is greater, of their initially issued annual halibut IFQ for use as GAF. Because IFQ holdings are generally larger in Area 3A than in Area 2C, IFQ holders in Area 3A will be able to transfer up to 15 percent of the IFQ as GAF. Restricting Area 3A IFQ holders to leasing up to 10 percent of their IFQ holdings could limit the amount of IFQ available for lease as GAF (section 2.5.12.2 of the Analysis). Allowing Area 3A IFQ holders to lease 15 percent of their IFQ holdings as GAF would provide Area 3A IFQ holders more flexibility in determining whether to lease IFQ as GAF and could provide more GAF to the Area 3A charter halibut fishery.

Under the CSP no more than a total of 400 GAF will be assigned during one year to a GAF permit assigned to a charter halibut permit that is endorsed for six or fewer anglers. No more than a total of 600 GAF will be assigned during one year to a GAF permit assigned to a charter halibut permit endorsed for more than six anglers. A person who holds both halibut IFQ and a charter halibut permit and would like to transfer that IFQ to GAF will be subject to the same transfer restrictions. The Council recommended different GAF limits for charter halibut permits to balance the GAF needs of different types of charter operations with its objective to maximize the opportunity for all charter operators to acquire GAF. Because holders of charter halibut permits endorsed for more than six anglers are likely to be larger charter operations, the Council was concerned these larger charter operations would have more financial resources to acquire GAF than smaller operations unless a limit was placed on the number of GAF that could be assigned to a charter halibut permit. NMFS agrees that the limit for assigning GAF to charter halibut permits accommodates the GAF needs of different charter operation types and promotes the Council's objective to offer all charter businesses the opportunity to lease IFQ as GAF.

Finally, as noted in Comment 68, smaller charter operations with fewer angler endorsements are actually entitled to more GAF per angler endorsement than larger operations with more angler endorsements per CHP.

Comment 68: The limits on GAF transfers discriminate against larger charter operations with more angler endorsements. Whereas a CHP endorsed for six anglers may lease up to 400 GAF in a season (67 GAF per angler endorsement), a CHP endorsed for 12 anglers is limited to only 600 GAF (50 GAF per angler endorsement). It would be fairer to limit CHP holders to a fixed number of GAF per angler endorsement.

Response: See response to Comment 67. The Council chose GAF transfer limits to prevent any business from obtaining an excessive share of GAF fishing privileges and to maximize the opportunity for all charter operations to acquire GAF. Revisions to these GAF transfer limits would need to be approved by the Council after the GAF program has been implemented.

Comment 69: How does a charter angler know that the charter guide is authorized to allow anglers to retain GAF? If the guide does not have GAF, and a charter angler retains a fish as GAF, who would be held responsible?

Response: The charter vessel guide and the charter vessel angler are both responsible for ensuring that sufficient GAF are available on the GAF permit for harvest. Current regulations at § 300.66(b) provide that it is unlawful for any person to fish for halibut except in accordance with the catch sharing plans and domestic management measures implemented under §§ 300.63, 300.65, and 300.67. This applies to "any" person, including a charter vessel angler. The GAF use restrictions at § 300.65(c)(5)(iv)(F) in the final rule state, "the charter vessel guide must ensure that each charter vessel angler complies with (c)(5)(iv)(A) through (E) of this section." Paragraph § 300.65(c)(5)(iv)(B) specifies that the number of GAF retained on board a vessel cannot exceed the number of unharvested GAF in the GAF permit holder's GAF account at the time of harvest. The charter vessel guide is also responsible for ensuring that clients do not exceed the sport fishing daily bag limit in effect for unguided anglers or the daily possession limits, among other requirements. GAF use restrictions and GAF reporting requirements are described in detail in the preamble to the proposed rule under the section entitled "IV. Guided Angler Fish (GAF)."

Comment 70: How will NMFS track transfers of IFQ and GAF and what will happen to unused GAF?

Response: NMFS described in detail in the preamble to the proposed rule under the section entitled "IV. Guided Angler Fish (GAF)" how transfers of IFQ and GAF will be tracked. In summary, the system currently in place for tracking halibut IFQ transfers will be modified to include GAF. Voluntary and automatic returns of GAF to IFQ were also explained in the proposed rule. Unused GAF may be voluntarily returned to the IFQ holder in August each year, or it will be automatically returned 15 days before the end of the commercial halibut fishing season (see regulations at § 300.65(c)(5)(i)(C) and § 300.65(c)(5)(ii)(B)(*5*)(*i*)).

Comment 71: How will GAF be monitored? What checks and balances will be in place to insure the rules are followed? Will auditors be hired to oversee the GAF program? Who is going to do the GAF enforcement? Where in the analysis can we find estimates of the cost of GAF enforcement? Are funds budgeted for GAF enforcement?

Response: A detailed description of how GAF will be monitored and the checks and balances that will be put in place to allow adequate enforcement was given in the preamble to the proposed rule under the section entitled "IV. Guided Angler Fish (GAF)" and is not repeated here.

As stated in section 2.5.12.2 of the Analysis, it is not possible to predict the number of GAF that will be made available for lease each year; therefore, it is difficult to predict how much GAF administration and enforcement will cost. NMFS does not anticipate needing to hire additional staff to administer and enforce the GAF program. NMFS Restricted Access Management Program will administer the GAF program; handling transfers of IFQ, issuing permits, and managing the electronic data submitted by GAF permit holders. The NOAA Office of Law Enforcement will be primarily responsible for enforcing the GAF program. Funds are not explicitly budgeted for GAF administration and enforcement, but costs incurred by NMFS related to the GAF program will be subject to cost recovery for the halibut and sablefish IFQ Program, as described on page 39143 of the proposed rule and in regulations at § 679.45.

Because GAF is a use of IFQ, the existing reporting system for the Halibut IFQ Program administered by NMFS Restricted Access Management Program will be modified to allow tracking of IFQ transfers and reporting of GAF. There are some costs associated with developing the regulations to implement and enforce GAF and the software needed to issue GAF permits and electronically report GAF. These costs will be recovered through IFQ cost recovery fees, i.e., fees assessed and collected on IFQ equivalent pounds harvested and paid by the IFQ holder. The fee percentage has rarely exceeded 2 percent and may not exceed 3 percent of the ex-vessel value of halibut landings. Additional information about cost recovery for GAF was given in the preamble to the proposed rule in the section entitled, "G. Cost Recovery for GAF."

Comment 72: Areas 2C and 3A are adjacent to one another at the south end of Alaskan IPHC regulatory areas. Why should halibut and sablefish QS holders in areas west of 2C and 3A pay for GAF enforcement if they are never going to receive any benefit from it? Can NMFS separately track GAF enforcement costs?

Response: Section 2.6.1.2 of the Analysis describes how NMFS will incorporate GAF into the existing cost recovery program for the halibut and sablefish IFQ fisheries. Under the current program, IFQ permit holders incur a cost recovery fee liability for every pound of IFQ halibut and sablefish that is landed under his or her

IFQ permit(s). This final rule implements regulations at § 679.45 specifying that an IFQ permit holder is responsible for cost recovery fees for landings of his or her IFQ halibut and sablefish, including any halibut landed as GAF that are derived from his or her IFQ accounts. The costs of administering and enforcing GAF that will be recoverable by NMFS were discussed in the response to Comment 71 and in the proposed rule for the CSP. For each IFQ permit, NMFS will determine the dollar amount of the fee due by multiplying the annual IFQ fee percentage (3 percent or less) by the value of all landed IFQ and GAF derived from the permit holder's IFQ permit(s). If the permit holder has more than one IFQ permit, the total amounts of each permit are summed to determine his or her total cost recovery fee.

The cost recovery fee is paid by both halibut and sablefish IFQ permit holders. The structure of the IFQ cost recovery program does not facilitate applying different fee percentages to IFQ holders in different areas, nor does it allow halibut and sablefish IFQ permit holders to be charged different fee percentages. Any increase in the cost recovery fees from implementation of the GAF program will be borne by all halibut and sablefish IFQ permit holders.

Halibut and sablefish IFQ permit holders pay the same IFQ fee percentage because typically halibut and sablefish are harvested by the same vessels and IFQ permit holders. NMFS does not divide costs of administering and enforcing the IFQ Program at a species or area level. For example, NMFS does not track the time spent answering questions about the IFQ Program from people holding Area 2C QS, versus people holding Area 3B QS. Establishing separate costs for halibut and sablefish IFQ holders for each area and species would result in higher overall costs for all IFQ holders because it would require more costly, inefficient, and administratively burdensome tracking and monitoring provisions. Following implementation of the GAF program, NMFS will calculate the overall enforcement and management costs of the IFQ and GAF programs combined, but will not differentiate costs by species or area.

As discussed throughout the Analysis and in the response to Comment 1, NMFS expects that the CSP will benefit halibut IFQ permit holders in Areas 2C and 3A by stabilizing the proportions of harvestable halibut available to the commercial and charter fisheries at all levels of halibut abundance and base both fishery allocations on the annual CCL. Halibut IFQ permit holders in Areas 2C and 3A will also have the opportunity to lease halibut IFQ as GAF to CHP holders. While the Council and NMFS cannot project how much IFQ will be leased by the charter sector, the ability to lease IFQ as GAF to CHP holders is expected to benefit IFQ holders in those areas, by allowing them additional flexibility when developing their annual harvest strategies.

NMFS acknowledges that QS halibut holders in areas west of Areas 2C and 3A (Areas 3B and 4) and sablefish QS holders will realize an incremental increase in cost recovery fees following implementation of the GAF program, but will not benefit from leasing IFQ to the charter sector. NMFS anticipates that the cost recovery fee for these QS holders will increase by a relatively small amount because the additional costs of administering and enforcing GAF are expected to be a relatively small portion of the total costs to NMFS of administering and enforcing the IFQ and GAF programs. NMFS received no comments from halibut QS holders in Areas 3B and 4 or sablefish QS holders opposing NMFS' proposed method for recovering fees associated with administering and enforcing GAF.

Comment 73: Why should any quota share holder who does not rent out GAF pay for GAF enforcement? At year's end NMFS will know exactly which QS holders leased GAF and how much it cost to enforce GAF. Why not require the QS holders who rent GAF pay for its enforcement?

Response: As described in the response to Comment 72, NMFS does not expect a substantial increase in fees to QS holders as a result of the GAF program. The method of assessing cost recovery fees proposed by the commenter would require a substantial change to the NMFS' current method of tracking management and enforcement costs for the IFQ Program and would result in higher cost recovery fees for QS holders than the method implemented by this final rule. Additionally, NMFS did not receive comments from QS holders in opposition to NMFS' proposed method for incorporating GAF into the existing cost recovery program for the IFQ fisheries. See Comment 71 for a description of how fees are tracked and assessed for the IFQ Program.

Comment 74: On page 39142 of the proposed rule, in the section describing GAF reporting requirements, NMFS notes that the Council recommended that GAF permit holders be required to allow ADF&G and IPHC sampling personnel access to landed halibut on private property for scientific sampling. The IPHC supports the intent of sampling GAF at all locations, because of the strong likelihood that GAF will have a different size distribution than the non-GAF harvest, and scientific sampling is the best method to collect those data. The proposed rule preamble notes that the impacts of requiring such access are unknown and that it is not currently being proposed. The IPHC staff encourages an expedient resolution of the issue and the inclusion of the necessary access provisions, so as to have an acceptable vehicle for collecting size distribution data on the exchange of halibut between the sectors.

Response: NMFS acknowledges the comment. NMFS is still considering how to best implement the scientific sampling aspect of the CSP while providing the public with predictability regarding the scope of inspections by sampling personnel. NMFS anticipates proposing this requirement in a separate rulemaking after completing its evaluation.

Comment 75: We suggest that unused GAF be returned to IFQ permit holders one month prior to the end of the season rather than 15 days prior, as proposed. The Analysis shows that 96–98 percent of charter harvest takes place by August 31; therefore, there is little reason to retain GAF in the charter sector into October. Weather conditions in November can often prevent commercial harvest, and an IFQ holder may have difficulty harvesting unused GAF that is not returned until 15 days prior to the end of the commercial fishing season.

Response: No changes were made from the proposed rule. NMFS agrees that most GAF will likely be used by September each year and expects that some unused GAF will be voluntarily returned to the IFQ holder as provided for in regulations at § 300.65(c)(5)(ii)(A)(*3*) and § 300.65(c)(5)(ii)(B)(*5*)(*i*). If an IFQ holder receives a return of GAF after the automatic return date and cannot harvest the IFQ before the close of the commercial fishery, that unused IFQ will be considered an underage in the next year, consistent with underage provisions at § 679.40(e). This underage would result in a greater allocation of IFQ in the following year.

The Council recommended that NMFS automatically return GAF 15 days prior to the end of the commercial halibut fishing season in order to maximize the opportunity for charter operators to use GAF throughout the charter fishing season while providing halibut QS holders with an opportunity to harvest unused and returned GAF before the end of the commercial fishing season. NMFS agrees that it is possible that the change in automatic return date from 15 days to one month prior to the end of the commercial fishing season suggested in the comment would not be likely to impact the ability of charter operators to use GAF based on historic harvest patterns. However, NMFS does not consider it is appropriate to make this change from the proposed to final rule because the Analysis and the record for Council development of the CSP supports an automatic return date of 15 days prior to the end of the commercial fishing season. The commenter could suggest the proposed change to the Council for its consideration of GAF program changes in the future.

Comment 76: GAF provides the opportunity for anglers to take a trophy fish in areas with size restrictions in place. Trophy fish are expensive to mount; many anglers choose instead to mount just the tail. Whether they mount the whole fish or just the tail, snipping the tail fin ruins the mount. Why was this not considered when GAF identification was raised as an issue?

Response: No changes were made from the proposed rule on the basis of this comment. This final rule implements a requirement for charter vessel guides to immediately remove the tips of the upper and lower lobes of the caudal (tail) fin to mark all halibut caught and retained as GAF (see § 300.65(c)(5)(iv)(G)). Many saltwater fish, including halibut, that are professionally mounted are made from reproductions, rather than molded casts of the original or traditional skin mounts. NMFS suggests that if the guide or angler were to photograph the dorsal and ventral sides of the fish or tail before clipping it, the taxidermist would be able to recreate the detail in the reproduction.

NMFS did not explicitly consider the issue of the effects on taxidermy when determining how to mark GAF to distinguish them from other halibut retained by a charter vessel angler, nor did anyone raise it as a significant concern during public testimony to the Council. Likewise, NMFS received more than 4,700 comments on the proposed rule (most of these were from anglers and charter businesses) and only one commenter raised this concern. The Council may consider changes to the GAF marking requirement in the future if it determines the impact is negatively impacting the ability of anglers to mount GAF halibut.

Comment 77: What prevents a charter operator from clipping the fins of all the fish in his box? There is no rule against this, only a requirement to clip GAF. What happens if a fish is retained that has a deformed (pre-clipped) tail fin? Is it a GAF or a sport caught fish? Uniquely numbered GAF tags would more positively identify a GAF than clipping a fin.

Response: NMFS agrees that the regulations do not contain a prohibition against clipping the tail fins of retained halibut; however, it is not clear why a charter vessel guide would do this. NMFS anticipates enforcement personnel inspecting halibut retained by charter vessel anglers with the tips of the upper and lower lobes of the caudal (tail) fin removed could be considered GAF. Enforcement personnel would have to consider the specific amount of clipped halibut on board and other information (e.g., GAF permit logs and saltwater charter logbooks) on a case-by-case basis.

NMFS does not expect that enforcement personnel would have any difficulty distinguishing a marked GAF from a halibut with a deformed or pre-clipped tail because a freshly clipped tail fin lobe would be visibly different than a healed-over wound or deformity. In addition to removing the tips of the upper and lower lobes of the tail fin, this final rule implements regulations requiring charter vessel guides to immediately record the date and the length of the GAF retained on the GAF permit log, providing a second means for enforcement agents to verify which fish are GAF (see § 300.65(d)(4)(iii)(A). The Council and NMFS considered issuing tags to identify GAF, but determined that they would be burdensome to charter operators, could easily be lost, would delay transfers of IFQ to GAF, and would likely end up as marine debris if the carcass is discarded at the dock. Removing the tips of the tail fin lobes was determined to be the least burdensome option for marking and identifying GAF.

Fishery Management Measures

Comment 78: The IPHC's adoption of management measures to implement domestic catch allocations such as the sector allocations specified in the CSP rule violates the Halibut Act and the Administrative Procedure Act. The public lacks the opportunity to comment with the current approach to setting annual charter harvest restrictions for Areas 2C and 3A because the annual management measures are not first published in a proposed rule with a well-defined comment period. The exclusion of a public comment period violates the Administrative Procedure Act. The Area 2A CSP includes a public comment period. Additionally, at three points in the process for setting annual management measures, the recommended measures could be overruled and replaced with different measures.

Response: NMFS provided an opportunity for the public to comment on the CSP proposed rule. This rule does not implement any annual management measures designed to limit charter harvest to an annual sector allocation. The CSP contemplates that the Council will continue the process by which it develops charter fishery management recommendations for IPHC consideration. The CSP also contemplates that the IPHC will continue its practice of adopting annual management measures necessary to maintain charter halibut harvest to its annual harvest allocation, and submit those measures to the United States for acceptance. IPHC annual management measures that are accepted by the Secretary of State with concurrence of the Secretary of Commerce are published in the **Federal Register** as specified by 50 CFR 300.62. NMFS notes that the Administrative Procedure Act's notice-and-comment requirements have been inapplicable to past publications of annual management measures under the foreign affairs functions exemption (5 U.S.C. 553(a)(1)). Determinations regarding applicability of the exemption are made on a case-by-case basis.

Comment 79: The guided harvest is currently managed within its GHL allocations in Area 2C and Area 3A using the same tools proposed under the CSP; therefore, the CSP is not necessary.

Response: NMFS acknowledges that charter harvests have been managed within the GHL since 2011 in both areas. However, as noted in response to Comment 2, the GHL is not appropriately responsive or adaptable to changes in halibut abundance. The Council has determined that the allocations under the CSP will better meet the Council's objectives of establishing a comprehensive management program for the charter halibut fisheries in Area 2C and Area 3A, with sector allocations that float with varying levels of halibut abundance and that balance the differing needs of the charter and commercial sectors across a range of halibut abundance.

Comment 80: The annual process for setting annual charter harvest restrictions is similar to the process undertaken for the sport halibut fisheries in Area 2A off of the Washington, Oregon, and California coasts.

Response: NMFS believes that the commenter is referring to the cooperative management approach taken by NMFS and the IPHC in Area

2A and acknowledges the comment. See also response to Comment 78.

Comment 81: The process outlined in the CSP to annually recommend charter management measures to the IPHC for implementation through IPHC regulations is preferable to the matrix proposed in 2011, which was inflexible and prescriptive. This is the most effective process and will minimize charter overages of its sector allocation, while maintaining the charter sector's and Council's objective to specify the management measures pre-season with no inseason changes or closures.

Response: NMFS agrees. The Council determined that the process for setting annual harvest restrictions for the charter sector endorsed by the CSP will more effectively meet its management objectives than the method for determining charter halibut fishery harvest restrictions proposed by NMFS in 2011 (76 FR 44156, July 22, 2011). The Council's rationale for endorsing a process to annually recommend charter management measures to the IPHC for implementation through IPHC regulations is discussed in section 2.5.3 of the Analysis and in the response to Comment 78.

Comment 82: Area 2C and Area 3A should have the same charter harvest restrictions so the charter operators and charter anglers in one area do not have an advantage over those in the other.

Response: The Council considered that Area 2C and Area 3A are distinct from each other in terms of halibut abundance trends and charter fishing effort when it recommended the CSP (see the proposed rule for the CSP and section 1.6.7 of the Analysis). The Council and NMFS are committed to using area-specific harvest restrictions that are tailored to the circumstances of the particular area.

Comment 83: The majority of the 4,740 comments received expressed opposition to a one-fish daily bag limit in Area 3A. If a one-fish bag limit were implemented, many people expressed that they would not come to Alaska to fish. Some commenters said they would go to Canada to fish for halibut instead. Some people were concerned that a one-fish bag limit would lead to high-grading and higher wastage mortality because more fish would be caught and released as anglers try to catch and retain the biggest fish possible.

Response: The CSP implemented by this final rule does not implement a one-halibut per day bag limit for Area 3A charter vessel anglers. The CSP changes the allocation between the charter and commercial sectors, but does not implement specific harvest restrictions for charter vessel anglers (see response to Comment 1). In developing any future recommendations for charter management measures to the IPHC, the Council will consider the anticipated impacts of alternative management measures on angler demand. Additionally, the Council intends to develop and recommend management measures that limit charter harvest to its fishery allocation while ensuring that the charter industry can provide anglers with the ''best'' fishing experience (see section 1.6.7 of the Analysis).

The CSP Analysis recognizes that allocations to the charter sector may be constraining at current low levels of halibut abundance. To address this possibility, the Council recommended the GAF program to meet the needs of the charter halibut fisheries in Areas 2C and 3A and provide flexibility for participants in the commercial and charter halibut fisheries. Under the GAF program, charter vessel anglers will have the opportunity to harvest additional halibut when the bag limit for charter anglers is more restrictive than for unguided anglers. Moreover, a one-halibut per day bag limit has been in place for charter vessel anglers in Area 2C since 2009. This reduced bag limit may have resulted in negative economic impacts for some Area 2C charter operations from reduced angler demand. However, the role of that bag limit in reduction in angler demand in comparison to other factors, such as large scale economic conditions, is not known (see section 2.6.1.1 of the Analysis). NFMS does not have information to confirm whether the one-halibut per day bag limit in Area 2C has caused some charter anglers to choose to fish in Area 3A or in other areas in Alaska or Canada.

Comment 84: Unguided and guided anglers should have the same bag and size limits. It is unfair that unguided anglers are not restricted by an allocation. The CSP discriminates against charter anglers. Charter anglers should not be managed differently than unguided anglers simply because they choose to hire someone else to drive the boat. Having stricter bag limits for guided anglers is unfair to those anglers who do not have their own boat, are coming from out-of-state and cannot bring their own boat, or are hiring a guide for other financial, health, safety, or other practical reason.

Response: The Council and NMFS have determined that this rule is fair and equitable to halibut fishermen (see the response to Comment 2). The Halibut Act does not require that different sectors of the halibut fisheries be managed using the same tools and restrictions. NMFS notes that while the Council has not specified a halibut allocation for the unguided recreational fisheries in Areas 2C and 3A, total harvest by unguided anglers is limited by the current bag limit under IPHC regulations, which is two fish of any size per day (78 FR 16423, March 15, 2013).

The charter halibut fishery is the second largest, in terms of volume of halibut harvested, after the commercial fishery in Areas 2C and 3A. The unguided sport fishery has the third largest harvest in both areas (see section 1.7.1.7 of the Analysis). Of these three harvesting sectors, the charter halibut fishery has demonstrated growth in participation over time while the commercial and unguided recreational sectors have declined or remained relatively steady. This information was in the Analysis considered by the Council and the Secretary of Commerce when taking this action. The Council's objective for the CSP is to address the ongoing allocation conflicts between the commercial and charter halibut fisheries, not to restrict unguided anglers.

The commenters' concerns about safety are addressed in the response to Comment 86.

Comment 85: Charter anglers should be managed differently than unguided anglers because the success rates for retained halibut are higher for a charter angler than an unguided angler. This difference in effort and impacts should be accounted for in management.

Response: The Council and NMFS agree that different management programs for charter vessel anglers and unguided anglers in Area 2C and Area 3A meet the Council's management objectives for recreational halibut fisheries in those areas. NMFS does not have information to confirm the commenter's assertion that success rates for retained halibut are higher for a charter angler than an unguided angler. See also response to Comment 84.

Comment 86: The differential bag limit for guided and unguided anglers compromises anglers' safety by encouraging more anglers to fish without the expertise of a guide. Anglers that would normally prefer to hire a guide for increased safety might choose to fish unguided instead, so that they may take advantage of the more liberal bag limit for unguided anglers. Differential bag limits will likely increase the number of illegal or unlicensed charter operations.

Response: NMFS is aware of no information demonstrating that this rule will create new safety risks. While it is possible that differential bag limits may create incentives for anglers to substitute unguided fishing for guided fishing, unguided fishing harvest estimates decreased from 2009 to 2011 after a one-fish bag limit was implemented in Area 2C in 2009 (see section 1.7.1.7 of the Analysis). If the one-fish bag limit was causing anglers to shift to more unguided angling, NMFS would expect to see an increase in unguided harvest estimates. NMFS notes that changes in the national economy also affect demand for charter vessel fishing trips, and may have also affected unguided halibut harvest since 2009 (see section 2.6 of the Analysis).

In its analysis of the potential effects of this rule the Council and NMFS found no safety concern. NMFS does not have the information to determine whether more restrictive halibut management measures for charter vessel anglers in Area 2C may have resulted in an increase in the number of anglers fishing for halibut without a guide. NMFS notes that the U.S. Coast Guard has not experienced an increase in search and rescue cases for recreational vessels in recent years, during which time the IPHC and NMFS implemented more restrictive bag limits for guided anglers than unguided anglers in Area 2C.

If differential bag limits are implemented in Area 3A under the CSP, some charter vessel anglers may choose to substitute unguided fishing for guided fishing to maintain a more liberal bag limit. These anglers may make arrangements to go fishing with friends or relatives, to patronize lodges and rentals with associated skiffs, or to patronize businesses providing access to supported (lodging, meals, instructions, and gear) fishing from unguided small boats. This latter business model is already present in Southeast Alaska and could expand to Area 3A in the future. Firms with this business model are likely to see an increase in demand for their product, and some guided firms may shift to this business model. This possibility is discussed in section 8.6 of the Analysis.

A potential shift from guided to unguided fishing within Area 2C and Area 3A focuses on one option available for guided anglers. While some may make this substitution, others may substitute activities in other regions, and those activities may be associated with their own risks which may be greater or less than those of guided charters. While the guided charter vessel fleet may have a good safety record on the water, travel to and from the fishing site is often done in small airplanes which, in Alaska, has inherent dangers. It is possible that some charter vessel anglers may substitute activities with less overall risk considering all the elements involved in a guided charter fishing trip. The net effect of this action on risk when all elements are considered cannot be determined with the available information. Some of these businesses will be firms that formerly provided guide services, or that begin to offer guided and unguided services. These firms are likely to provide monitoring of, and support to, anglers despite the absence of a guide on board a vessel. Large proportions of resident and non-resident sport anglers already are involved in unguided sport fishing in Alaska, and unguided business models already are used to provide resident and non-resident access to halibut fishing opportunities.

Comment 87: Treat Alaska residents and non-residents differently in commercial and charter fishing regulations. Implement less restrictive limits for Alaska residents or prohibit out-of-state residents from owning charter businesses or fishing commercially for halibut in Alaska.

Response: The Halibut Act at 16 U.S.C. 773c(c) states that regulations developed by the North Pacific Fishery Management Council to govern the halibut fishery shall not discriminate between residents of different states. The regulations implemented by this action do not discriminate between residents of different states. Charter vessel anglers who receive sport fishing guide services from charter halibut permit holders affected by this rule also are not discriminated against on the basis of state of residence. Such anglers will have the same opportunity to participate in the Area 2C and Area 3A charter halibut fishery regardless of state residence. Regulations at § 300.65 implementing the CSP allocations to the commercial and charter halibut sectors and authorizing the transfer and use of halibut IFQ as GAF apply to all persons participating in the commercial and charter halibut fisheries in Areas 2C and 3A regardless of state of residence.

Comment 88: Skipper and crew should not be restricted from harvesting halibut on charter vessels. Halibut harvested by skipper and crew have historically been calculated as unguided sport fishing poundage and have not counted toward the GHL; therefore, prohibiting skipper and crew harvest will not reduce total charter harvest. Additionally, this prohibition will create an economic hardship for skippers and crew who would be required to take a separate trip to harvest fish for their own personal use.

Response: NMFS disagrees. Skipper and crew are required to record their harvest in the ADF&G saltwater charter logbook and it counts as charter halibut harvested; therefore, prohibiting skipper and crew harvest will reduce total charter harvest or allow more of the charter harvest to be caught by charter vessel anglers. As discussed on page 39136 of the proposed rule, the Council recommended that NMFS implement this provision in the CSP to clarify that only halibut harvested by charter vessel anglers will be counted toward the CSP charter halibut fishery allocation. Charter operators, guides, and crew are not considered charter anglers under current Federal regulations, and NMFS does not consider it appropriate for halibut harvested by these persons to be counted toward the charter halibut fishery harvest. Additionally, halibut harvested by charter operators, guides, and crew are difficult for enforcement agents to distinguish from halibut caught by charter vessel anglers.

Comment 89: In its December 2011 motion, the Council instructed staff to initiate a discussion paper to analyze the prohibition on skipper and crew harvest during charter vessel fishing trips. In Appendix 3 of the resulting discussion paper, staff noted that restricting skipper and crew harvest was already part of the CSP and no further action was needed. Please provide an explanation why alternatives to the skipper and crew prohibition were not considered. Was the December 2011 motion amended? And if so, why was this not documented? The analysis did not look at the economic impact on skipper and crew and did not consider anything less draconian than an outright ban, even though other options exist.

Response: In its December 2011 motion, the Council recognized that there were management options available that were not included as part of the Halibut CSP preferred alternative (*http://alaskafisheries.noaa.gov/npfmc/PDFdocuments/halibut/HalCSPmotion1211.pdf*), and included restricting captain and crew retention of fish as one potential management measure to be considered in a discussion paper. The Council had overlooked that a prohibition on skipper and crew harvest was already part of the original motion for a CSP adopted in April 2008 (*http://alaskafisheries.noaa.gov/npfmc/PDFdocuments/halibut/HalibutCharterMotion408.pdf*). As chronicled in the resulting March 2012 discussion paper (*http://alaskafisheries.noaa.gov/npfmc/PDFdocuments/halibut/CSPDiscussionPaper312.pdf*), when it was brought to the Council's attention by Council staff that the prohibition on skipper and crew harvest was already part of the CSP, the Council did not request further action or analysis of any other alternatives to an outright ban. These documents were all available on the Council Web site, so NMFS disagrees that this action was not documented.

Charter guides, operators, and crew have been prohibited from retaining halibut in Area 2C since 2009 (74 FR 21194, May 6, 2009). This final rule extends the provision to skipper and crew in Area 3A at § 300.65(d)(3). The economic impacts of prohibiting skipper and crew harvest during charter vessel fishing trips were discussed in section 2.5.12.12 of the Analysis and in the analysis for the rule that implemented the prohibition in Area 2C (*http://alaskafisheries.noaa.gov/analyses/halibut/area2c_charterhalibut_earirfrfa0309.pdf*). Additional reasons for prohibiting skipper and crew harvest were given in the response to Comment 88.

Comment 90: I support prohibiting skipper and crew harvest during charter vessel fishing trips.

Response: NMFS acknowledges the comment.

Comment 91: I support the requirement that charter operators be required to retain halibut carcasses when a size limit is in place and the prohibition on using both a charter halibut permit and a Subsistence Halibut Registration Certificate (SHARC) on the same day.

Response: NMFS acknowledges the comment. This final rule does not change the carcass retention requirement at section 28(2)(b) of the IPHC annual management measures and implements the prohibition on using both a charter halibut permit and a SHARC on the same day at § 300.66(h).

Comment 92: The proposed rule includes a prohibition for individuals who hold both a charter halibut permit and commercial halibut IFQ from fishing for commercial and guided sport halibut on the same vessel and on the same day for enforcement purposes. We support this and previously had stated this practice should be prohibited by fishing trip, as different regulations apply. IPHC regulations currently prohibit possession of sport-caught halibut and commercial halibut on the same vessel at the same time, as they prohibit halibut caught in the sport fishery to be possessed on board a vessel with fish destined for commercial use or sale (IPHC annual management measures section 25(6)).

Response: NMFS acknowledges the comment. Under this final rule, a person is prohibited to fish for charter and commercial halibut on the same vessel on the same day (see § 300.66(i)). This final rule will not prevent a person who holds both a charter halibut permit and commercial halibut IFQ from conducting charter operations and commercial operations on separate vessels on the same day. IPHC regulations prohibit possession of sport-caught halibut when ''other fish or shellfish aboard said vessel are destined for commercial use . . .'' These two regulations will keep sport-caught and commercial halibut separate to facilitate enforcement.

Comment 93: The final rule should clarify that charter clients cannot retain halibut in the same trip from Area 2C and 3A and clarify whether it is prohibited to fish in both areas or just to retain halibut.

Response: Regulations at § 300.66(v) (as redesignated by this rule) prohibit being an operator of a vessel in Area 2C and in 3A during one charter vessel fishing trip. Additionally, to fish in both areas on separate trips, an operator would need to possess a separate charter halibut limited access permit for each area. Only a few charter businesses hold CHPs in both areas. The Council did not recommend changes to this regulation under the CSP and the Analysis did not discuss the impacts of changing the regulations as suggested. NMFS is not making the requested change in this final rule.

Comment 94: The Charter Halibut Management Implementation Committee was formed too late to give adequate input on the CSP.

Response: The commenter misunderstands the purpose of the Charter Halibut Management Implementation Committee, which was formed to provide recommendations to the Council for annual management measures intended to limit charter harvest to the sector allocation while minimizing negative economic impacts to the charter fishery participants in times of low halibut abundance. The Charter Halibut Stakeholder Committee provided input on the CSP (see response to Comment 107).

Recordkeeping and Reporting

Comment 95: NMFS proposes to use ADF&G saltwater charter logbooks to account for charter harvest under the CSP. Previously, the statewide harvest survey (SWHS) was used to estimate charter halibut harvest. A conversion factor must be applied to accurately compare logbook and SWHS estimates. The purpose of a logbook conversion factor is to make meaningful comparisons of the GHL (status quo) to the CSP allocation alternatives using a common metric.

NMFS compared logbook and SWHS harvest estimates from 2006 to 2010 to obtain this conversion factor. Explain why 2011 data were not used in calculating the conversion factor, even though the analysis contains graphical comparisons that included 2011 data.

Additionally, for Area 3A, NMFS inappropriately subtracted skipper and crew harvest from the CSP allocation alternatives. The status quo includes harvest by skipper and crew. The CSP charter allocations should not be reduced by skipper and crew harvest because those fish were available for harvest by charter vessel anglers under the GHL in years when skipper and crew were prohibited from retaining halibut.

Response: In April 2012, the Council amended its previous action on the CSP (*http://alaskafisheries.noaa.gov/npfmc/PDFdocuments/halibut/CSPmotion412.pdf*). In that motion, the Council adopted the unanimous recommendation of the Halibut Charter Management Implementation Committee and the Advisory Panel to use ADF&G saltwater charter logbooks as the primary data collection method. The Council recommended using an adjustment factor based on the five-year average (2006–2010) of the difference between the harvest estimates provided by the logbooks and the SWHS, with the adjustment factor reduced by the amount of harvest attributed to skipper and crew, to create new alternatives with adjusted allocation percentages. The adjustment factors were used to increase the allocations to the charter sector in Alternatives 3 and 5.

As discussed in Section 2.3.2.1 of the Analysis, one of the drawbacks of the SWHS is that harvest estimates are not available until September of the year following harvest; i.e., a SWHS estimate of 2011 charter halibut harvest was not available until September 2012. In April 2012, when the Council took action, the SWHS estimate for 2011 was not yet available, and so they made their decision based on the best available information at that time. Table 2–1 (p. 125) of the initial draft of the Analysis (*http://alaskafisheries.noaa.gov/analyses/halibut/drafthalibut_csp0912.pdf*) does not include 2011 data in comparisons of logbook and SWHS harvest estimates. This was the version of the Analysis that was available at the time of Council action. The draft of the Analysis published with the proposed rule was updated to include the 2011 data after passage of the final motion (Table 2–2, *http://*

alaskafisheries.noaa.gov/analyses/halibut/drafea_halibutcsp0613.pdf).

NMFS notes that the allocation alternative selected by the Council for Area 3A did not include a logbook adjustment.

Comment 96: Charter vessel guides are required by State of Alaska regulations to document the number of halibut caught and released by charter vessel anglers in the ADF&G saltwater charter logbook. This information will facilitate wastage estimation for separate accountability. The CSP should mandate in Federal regulations that charter vessel guides record the number of halibut released.

Response: No changes were made from the proposed rule. ADF&G has required that charter vessel guides record the number of halibut kept and released by charter vessel anglers since the saltwater charter logbook program began in 1998. NMFS anticipates that ADF&G will continue to require charter vessel guides to record the number of halibut released by charter vessel anglers. See also response to Comment 36 and Comment 37.

Comment 97: The final rule should clarify that regulations require the guide to enter the name and license number of each angler on board in the charter logbook before the charter trip begins. Those charter vessel anglers on board that have no plans to fish for halibut should be required to sign the logbook before the beginning of the trip. This would help enforcement agents clearly identify the number of anglers fishing for halibut compared to the angler endorsement on the charter halibut permit.

Response: No changes were made from the proposed rule. NMFS has determined that the recordkeeping and reporting regulations implemented by this final rule provide for effective monitoring and enforcement of halibut harvested by charter vessel anglers in Area 2C and Area 3A. Regulations at § 300.65(d)(4)(ii)(B)(*6*) require charter vessel guides to record in the ADF&G saltwater charter logbook the name and license number (if applicable) for each paying or non-paying charter vessel angler on board that will fish for halibut. Regulations at § 300.65(d)(4)(ii)(A) require only charter vessel anglers retaining halibut caught to sign the logbook data sheet on the line that corresponds to the angler's information. This signature requirement promotes accurate reporting of halibut retained by charter vessel anglers and facilitates enforcement of charter halibut harvest restrictions such as daily bag and size limits. This regulation has been in effect in Area 2C since 2009 (74 FR 21194, May 6, 2009), and this final rule extends the signature requirement to include charter anglers in Area 3A as part of the CSP in the event that additional harvest restrictions are implemented in that area.

Comment 98: Charter guides are currently required to provide a single statistical area location in logbooks where the majority of their catch occurs each day. Since charter guides often fish more than a single statistical area each day, the current requirement obscures the true spatial and temporal pattern of associated fishery mortality. This potentially limits fishery managers' ability to detect these underlying patterns. This inability to accurately attribute fishery mortality spatially is problematic for attributing halibut harvest within the waters of Glacier Bay National Park. We recommend that NOAA fishery managers consider the relative costs and benefits of more detailed, spatially explicit halibut harvest reporting that would require reporting fishing activity within the appropriate ADF&G six digit charter logbook areas, rather than a single statistical area for the entire day.

Response: No changes were made from the proposed rule on the basis of this comment. NMFS has determined that the data collected in the ADF&G saltwater charter logbook, aggregated at the level of IPHC regulatory area, provide the Council and the IPHC with information necessary to promote their stated conservation and management objectives for the Area 2C and Area 3A halibut fisheries.

It is NMFS' understanding that the National Park Service requires a special permit for charter vessels to operate within Glacier Bay National Park. If the National Park Service would like to obtain spatial and temporal halibut harvest data for charter vessels within Glacier Bay National Park, it could consider developing a logbook for charter operators in that area.

Comment 99: We support the GAF electronic reporting requirements and request that a ''charter trip'' be clearly defined to ensure reports are timely.

Response: No changes were made from the proposed rule. NMFS has determined that the GAF electronic reporting requirements implemented by this final rule promote timely reporting of GAF harvests in Area 2C and Area 3A. Regulations at § 300.61 define ''charter vessel fishing trip'' as the time period between the first deployment of fishing gear into the water from a vessel after any charter vessel angler is on board and the offloading of one or more charter vessel anglers or any halibut from that vessel. This rule implements regulations at § 300.65(d)(4)(iii)(D) requiring a GAF permit holder to submit a GAF electronic report to NMFS by 11:59 p.m. (Alaska local time) on the last day of a charter vessel fishing trip in which a charter vessel angler retained GAF.

Comment 100: The requirement for charter vessel guides to immediately record total halibut length in inches on the GAF permit for retained GAF is unrealistic. Given existing constraints on charter vessel guides' time and attention, guides may not be able to accurately and reliably measure every GAF. There could be high variability in accuracy of lengths due to non-standardization in scales used by charter guides or measurement error. Consider evaluating the accuracy of charter guide halibut length measurement. Perhaps ADF&G creel clerks could assist with length measurement accuracy assessments, although assessment of length estimation accuracy in non-survey areas may be problematic.

Response: No changes were made from the proposed rule. NMFS believes that charter vessel guides will comply with the requirement at § 300.65(d)(4)(iii)(A)(*1*) to record on the GAF permit the date that the fish was caught and retained and the total length of that fish. Charter vessel anglers Area 2C have been limited to retaining halibut of a specified size during most years from 2007 through 2013, and these limits have required charter vessel guides to measure halibut at the time it is retained by anglers. This final rule also promotes accurate GAF reporting and facilitates enforcement of GAF regulations by implementing a GAF electronic reporting requirement at § 300.65(d)(4)(iii)(A)(*2*) in addition to a requirement at § 300.65(c)(5)(iv)(G) for charter vessel guides to retain the carcasses of GAF that are filleted on board the vessel for the duration of the charter vessel fishing trip.

Comment 101: The GAF reporting requirements at § 300.65(d)(4)(iii)(D) should include a requirement to electronically report the date on which the GAF was caught. The date is required to be reported on the GAF permit, and would be important to collect for validation, especially from vessels doing multi-day trips that are not required to file an electronic report until the end of the last day of the trip. Additionally, assuming accurate reporting, requiring reporting of the vessel identification number, guide license number, or community or port where the charter trip ended is not necessary. The vessel identification is currently linked to the logbook when the logbook is assigned, and the other items are reported in the logbook data and would be available by linking to the logbook number and date.

Response: NMFS agrees that the date on which a GAF was caught should be electronically reported for validation and has made the suggested change (see ''Changes from the Proposed Rule'' section). NMFS disagrees that the vessel identification number, guide license number, and community or port where the charter vessel fishing trip ended (for community CHPs) are not needed, and no changes are made from the proposed rule in response to this comment. By requesting that GAF permit holders submit these data elements in the GAF electronic report, enforcement agents will have all of the information needed to initiate an investigation without having to request the data from ADF&G. This collection-of-information was reviewed under the Paperwork Reduction Act and approved by the Office of Management and Budget.

Comment 102: While NMFS sets fishing limits it appears there is no real means to count fish caught by guided anglers and charter operators. In the interest of good scientific data, a means of having realistic catch numbers recorded would support proposed rules and justify limits set forth.

Response: NMFS disagrees. The IPHC, not NMFS, determines the annual catch limits using estimates of all sources of halibut removals, including halibut caught by unguided anglers and charter operators (see ''Catch Sharing Plan for Area 2C and Area 3A'' section of this final rule and the response to Comment 1). Catch limits and management measures are implemented by the IPHC using the best data available, including estimates of halibut harvested by charter vessel anglers and recorded in ADF&G saltwater charter logbooks (see section 2.3.2 of the Analysis).

Other Specific Issues

Comment 103: The CSP violates the Magnuson-Stevens Act and the Halibut Act because the allocations are disproportionate between the charter and commercial industry and adverse economic impacts on affected communities have not been minimized.

Response: The CSP was developed and approved pursuant to the Halibut Act, not the Magnuson-Stevens Act. As explained in the response to Comment 2, the Halibut Act at 16 U.S.C. 773c(c) requires that allocations must be fair and equitable to affected halibut fishermen. The response to Comment 2 summarizes NMFS' consideration of fairness and equity. As discussed in the response to Comment 121, NMFS has considered economic impacts on small communities. However, NMFS notes that the Halibut Act does not impose a requirement that adverse economic impacts on affected communities be minimized.

Comment 104: The CSP is fair and equitable.

Response: See the response to Comment 2 for a description of how the CSP complies with the fairness and equity requirements of the Halibut Act.

Comment 105: The CSP is contrary to the plain meaning of the statutory term ''fair'' in the Halibut Act.

Response: The Secretary of Commerce has determined that the CSP meets the requirements of the Halibut Act including the requirements for fair and equitable distribution of access privileges as summarized in the response to Comment 2.

Comment 106: The CSP sets allocations that can never be removed, changed, or modified without the concurrence of the IPHC, and it forecloses any public comment by U.S. citizens under the Administrative Procedure Act about future catch levels.

Response: The Halibut Act at section 773c authorizes the Council to develop, and the Secretary of Commerce to approve, regulations that are in addition to, and not in conflict with, regulations adopted by the IPHC. The sector allocations established in this CSP were developed and approved consistent with section 773c. The public was afforded the opportunity to participate during the Council's development of the formula for the sector allocations and NMFS published the proposed sector allocation formula for public comment consistent with section 553(c) of the Administrative Procedure Act. The sector allocation formula will apply in a predictable and standardized process to the IPHC's combined catch limit (CCL) each year, resulting in the catch limits for the charter sector and to the commercial sector in Areas 2C and 3A. The Council may develop modifications to the CSP in the future through the same public Council process and submit those modifications to NMFS for approval and implementation.

Comment 107: There is a commercial bias on the Council. Fisheries management has unfairly supported commercial interests at the expense of the charter fleet. The Council has violated the Magnuson-Stevens Act requirement for fair representation because it has only one representative from the charter fishing sector. The charter halibut fishery and recreational interests are not adequately represented on this decision-making body.

Response: The consideration of balance and fairness between commercial and recreational fishing sectors is an important element in the Secretary's appointments to the regional fishery management councils. Because of the limited number of Council seats and the diversity of fisheries managed by the Council, not all sectors can be represented through membership on the Council. For example, Pacific halibut is just one of 112 finfish species under active management by the Council, and is the only federally managed sport fish in its jurisdiction. Nevertheless, the commenter notes that Council membership includes one charter sector representative. NMFS also notes that the Council has formed a Charter Halibut Stakeholder Committee to advise the Council on industry proposals for CSP allocation options and the GAF program, and the Charter Halibut Limited Access Program. In 2011, the Council formed the Charter Halibut Management Implementation Committee to propose and recommend alternative management measures governing the charter halibut sector in times of low abundance to reduce uncertainty and mitigate negative economic impacts for fishery participants. To the extent that the comment implies that the CSP is unfair to the charter sector, NMFS has determined that the CSP is fair and equitable to halibut fishermen, including those participating in the charter sector. See the response to Comment 2.

Comment 108: The CSP will incorporate recreational anglers on charter boats into a commercial fishery management scheme. Will the next logical step be to allow recreational anglers on charter boats to use as many hooks as they want, similar to longliners? Or will longliners be restricted to one hook as recreational anglers are?

Response: NMFS disagrees with the commenter's assertion that the CSP is incorporating management of charter anglers into a commercial fishery management scheme, and assumes that the comment is referring to the GAF provision of the CSP. As described above in the ''Catch Sharing Plan for Area 2C and Area 3A'' section, the CSP authorizes commercial halibut QS holders to transfer IFQ as GAF to charter halibut permit holders, but the fisheries will continue to be managed separately. The CSP does not change the gear types and limits currently established in regulation for the Area 2C and Area 3A for the commercial or charter halibut fisheries (see sections 19 and 25 of the IPHC annual management measures (78

FR 16423, March 15, 2013) and Table 15 to 50 CFR part 679).

Comment 109: Charter operators who hold IFQ have an unfair advantage. GAF will discourage healthy competition between charter operations.

Response: NMFS disagrees that allowing persons who hold halibut QS and one or more CHPs to lease IFQ as GAF will provide them with an unfair advantage and discourage competition. CHP holders who also hold halibut QS comprise approximately 6 percent of all CHP holders and 2 percent of all halibut QS holders in Area 2C and Area 3A (see section 2.5.12 of the Analysis). The amount of IFQ that is held by this small portion of CHP and IFQ permit holders and could be leased as GAF is unlikely to impact the overall supply of and demand for GAF in Area 2C and Area 3A. As described in the Analysis and in the response to Comment 45, the supply of and demand for GAF will be determined by the value of halibut in the directed commercial fishery and charter vessel anglers' willingness to pay higher prices for trips that allow greater harvest flexibility by using GAF, in addition to other factors. NMFS also notes that the regulations at § 300.65(c)(5)(iv)(H) implemented by this final rule restrict a person holding halibut QS and one or more CHPs to the same GAF transfer limits that apply to all other CHP and IFQ holders.

Comment 110: The CSP was developed with Area 2C in mind because charter harvests in that area had been exceeding the Area 2C GHL. Area 3A charter harvests have consistently been below the Area 3A GHL. The economic analysis was biased toward the type of business operations that exist in Area 2C. The CSP is not necessary for Area 3A.

Response: NMFS agrees that harvest of halibut in the Area 3A charter fishery has not exceeded the GHL since 2007 (see Table 2 in the proposed rule for the CSP). However, NMFS disagrees that the CSP should not be implemented for Area 3A. The proposed rule for the CSP describes that the objectives of the program are to define an annual process for allocating halibut between the charter and commercial halibut fisheries in Area 2C and Area 3A, establish allocations that vary with changing levels of annual halibut abundance and that balance the differing needs of the charter and commercial halibut fisheries over a wide range of abundance, and specify a process for determining harvest restrictions for charter anglers that are intended to limit harvest to the annual charter halibut fishery catch limit. Thus, while limiting harvest in the charter fishery to the annual charter catch limit is an important component of the CSP, it is not the only purpose for implementing the program. Also see the response to Comment 1.

Comment 111: The GAF program is unfair to the charter sector. To be fair, a leasing option needs to be two-way, not just from the commercial to the charter sector.

Response: As described in the response to Comment 107, the Council considered recommendations from its Charter Halibut Stakeholder Committee during development of the CSP. The Charter Halibut Stakeholder Committee individually proposed or reviewed industry proposals for CSP allocation options, the GAF program, and the Charter Halibut Limited Access Program. In recommending the CSP to NMFS for approval and implementation, the Council adopted the Charter Halibut Stakeholder Committee's recommendation to include GAF in the CSP as a voluntary, market-based mechanism for transferring halibut allocation from the commercial sector to the charter sector in order for the charter sector to access additional halibut under a potentially constraining allocation. NMFS notes that modifications to the GAF program, such as the two-way leasing option as suggested in the comment, could be recommended to the Council for its consideration in the future.

Comment 112: Why are military charter vessels (vessels operated by U.S. Military Morale, Welfare and Recreation (MWR) programs for recreational use by service members) included in this rule?

Response: Military charter vessels are managed in the same manner as all other charter vessels. The final rule for the charter halibut limited access program describes that military Charter Halibut Permits (CHP) are special permits issued to charter vessels operated by MWR programs (75 FR 554, January 5, 2010). NMFS issues these military CHPs to authorize MWR programs to continue to afford U.S. military personnel charter halibut recreational opportunities (see regulations at § 300.67(l)). Although MWR programs have been issued special CHPs, the MWR programs are subject to the same regulatory requirements as any other guided charter operation, with one exception—the GAF transfer limits that apply to all other CHPs do not apply to military CHPs (see this final rule text at § 300.65(c)(5)(iv)(H)).

Comment 113: The Council unlawfully changed the April 2012 CSP motion at the June 2012 Council meeting in Kodiak, AK, because the CSP was not on the published agenda for the June Council meeting. According to the Magnuson-Stevens Act, 16 U.S.C. 1852(i)(C), the published agenda of the meeting may not be modified to include additional matters for Council action without public notice or within 14 days prior to the meeting date, unless such modification is to address an emergency action.

Response: In April 2012, the Council amended its 2008 CSP preferred alternative and identified new alternatives for analysis and consideration. Final action to select a new CSP preferred alternative was scheduled for October 2012. The April 2012 motion included the unanimous recommendation of the Charter Halibut Management Implementation Committee to use ADF&G saltwater charter logbooks as the primary data collection method and to adjust (increase) the charter sector allocations by the five-year average percentage difference between the charter harvest estimates provided by the logbooks and the statewide harvest survey. The April 2012 motion stated that the adjustment factor for Area 3A should be reduced by the amount of harvest attributed to skipper and crew (see also the response to Comment 89). The adjustment factors in the April 2012 motion were 15.4 percent for Area 3A and 5.6 percent for Area 2C, but erroneously did not include the reduction for skipper and crew harvest in Area 3A.

In June 2012, Council and ADF&G staff provided notice that an error was found in the adjustment factor in Area 3A in that it did not contain the additional adjustment for skipper and crew harvest, and provided the corrected adjustment factor. The Council affirmed that this correction is consistent with Council intent and that the revised CSP analysis scheduled for review in October should use the corrected adjustment factor. The revised adjustment factor for Area 3A was 11.6 percent and resulted in a decrease in allocations under Alternatives 3 and 5 of 0.6 percent at abundances less than 25 million lb. No other changes to the motion or analysis were adopted.

The Council did not adopt a new motion in June. The Council received notice of an error in the calculation of the adjustment factor it recommended in its April motion; therefore, the item was not included on the published agenda. Based on the June 2012 clarification on the Area 3A adjustment factor, Council staff incorporated the corrected logbook adjustment factor into the CSP Analysis presented to the Council in October 2012. The Council recommended a CSP preferred alternative in October 2012, and the agenda item was posted for the public according to the requirements in the Magnuson-Stevens Act. NMFS notes that the Council did not select a preferred alternative for Area 3A that included the logbook adjustment factor.

Comment 114: Postpone implementing the CSP until a Final Supplemental Environmental Impact Statement is complete and all requirements under the Regulatory Flexibility Act and E.O. 12866 are met.

Response: NMFS has complied with the requirements of the Regulatory Flexibility Act, Executive Order 12866, and the National Environmental Policy Act (NEPA) with respect to this action. NMFS prepared Initial and Final Regulatory Flexibility Analyses to comply with the requirements of the Regulatory Flexibility Act. NMFS prepared a Regulatory Impact Review (RIR) and the Office of Management and Budget has determined that this rule is not significant for purposes of E.O. 12866. NMFS prepared an Environmental Assessment (EA) to comply with the NEPA requirements for this action. The EA evaluated the environmental impacts of the action and its alternatives and found that it would not have a significant environmental impact on the human environment; therefore, an Environmental Impact Statement is not required. The EA, RIR, and IRFA were part of the Analysis prepared for this action and are available on the Internet (see **ADDRESSES** section). The FRFA and E.O. 12866 statement are presented in the Classification section of this final rule.

Comment 115: Did NMFS notify federally recognized Indian tribes in small communities, such as Ninilchik and Seldovia, about the proposed rule? If so, what was the position of these tribes on the proposed rule? If not, why were they not notified? Did NMFS determine whether the proposed rule would have a significant impact on the tribes?

Response: Executive Order 13175 requires NMFS to have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that may have tribal implications. Tribal implications are defined as those actions that may have a ''substantial direct effect on one or more Indian tribes.'' The Alaska Regional Office's tribal consultation process is described on our Web site (*http://alaskafisheries.noaa.gov/tc/*).

As described in the response to Comment 1, this rule implements allocations between two sectors and links the charter sector's allocations more directly to halibut abundance. The CSP has been on the agenda at numerous Council meetings since 2008, and has been the subject of two proposed rules seeking public comment. The first of these proposed rules, published on July 22, 2011 (76 FR 44156), elicited over 4,000 public comments. The second proposed rule was published on June 28, 2013 (78 FR 39122), with comments invited through August 12, 2013. The comment period on this proposed rule was extended to August 26, 2013 (78 FR 44920, July 25, 2013). NMFS received approximately 4,470 comments on this proposed rule. Public comment received throughout the Council's development of the CSP and during the rulemaking process did not indicate that the CSP would have a substantial direct effect on any tribe, and NMFS did not receive any requests for consultation by any tribe. Therefore, NMFS did not specifically notify the tribes of the proposed action.

While the impacts of the CSP on the communities of Ninilchik and Seldovia were not specifically analyzed, the impacts of the CSP on communities were analyzed in section 2.7 of the Analysis, which NMFS made available on its Web site at *http://alaskafisheries.noaa.gov/analyses/halibut/drafea_halibutcsp0613.pdf*.

Comment 116: The CSP violates the rights of U.S. citizens by limiting their access to halibut, a public resource. Recreational anglers are entitled to more than one halibut.

Response: NMFS disagrees with the commenter's assertion that U.S. citizens and charter anglers are entitled to harvest more than one halibut per person per day. Although this action may constrain the amount of halibut available for harvest in the charter sector compared to historical harvests, no sport angler will be prevented from having access to the halibut resource for sport fishing.

Comment 117: The CSP may violate the Americans with Disabilities Act (ADA) by creating an additional barrier to disabled Americans to access the halibut resource.

Response: While it is not clear why the commenter believes the ADA applies in this situation, NMFS disagrees that the CSP creates additional barriers for disabled people to access the halibut resource. Disabled Americans may still access the resource as guided or unguided anglers, subsistence anglers, or by purchasing commercially caught halibut in the marketplace.

Comment 118: The CSP may violate United States antitrust laws by discouraging fair competition between the charter and commercial halibut sectors. The CSP also limits benefits of consumers of charter halibut services by encouraging anglers to fish without a guide.

Response: NMFS has no information indicating that the CSP might violate any provision of antitrust laws. The CSP implements sector allocations and a GAF program. The Council and NMFS have determined that the CSP is fair and equitable to halibut fishermen (see response to Comment 2) and have evaluated its economic impacts (see response to Comment 120). Moreover, as noted in the response to Comment 86, NMFS does not have the information to determine whether more restrictive halibut management measures for charter vessel anglers in Area 2C may have resulted in an increase in the number of anglers fishing for halibut without a guide. Similarly, NMFS lacks information to determine whether future restrictions for charter vessel anglers in Area 3A would lead some charter vessel anglers to substitute unguided fishing for guided fishing to maintain a more liberal bag limit. NMFS notes that limits on the amount of IFQ that can be transferred and received as GAF were included in the CSP to prevent large charter operations from receiving an excessive share (see regulations at § 300.65(c)(5)(iv)(H) and the responses to Comments 62 and 67). Limits are already in place under the IFQ Program and Charter Halibut Limited Access Program to prevent excessive consolidation (see regulations at § 679.42 and § 300.67(j)).

Comment 119: Under the Alaska Constitution, no one user group should have an unequal share of Alaska's resources and Alaskan residents should have priority access to the halibut resource.

Response: Pacific halibut are subject to federal management under regulations published under authority of the Halibut Act. The Halibut Act does not allow management measures to discriminate between residents of different states. The CSP fairly and equitably allocates halibut fishing privileges between the commercial and charter sectors (see response to Comment 2).

Economic Impacts

Comment 120: Delay implementation of the CSP until an adequate economic study is conducted. The economic analysis is inadequate. NMFS did not try hard enough to find the best available information about the economic impacts of the CSP on the charter halibut fishery.

Response: The Council and Secretary of Commerce have determined that the Analysis adequately displays the economic impacts of this action, including the impacts on the commercial and charter halibut sectors in Areas 2C and 3A.

The Analysis used the best available economic information for the charter sector to examine the costs and benefits of the alternatives considered for the CSP. Because cost and revenue information is not available for individual charter operations in Area 2C and Area 3A, the Council developed estimates of costs and gross revenues for representative charter operations using reports from sector participants and assumptions based on available data. The Analysis describes that the primary costs associated with charter operations are the vessel and charter halibut limited entry permits. The Council and NMFS have information on the cost of acquiring charter halibut limited access permits from a limited number of transactions, but the information does not indicate how these vessel costs apply to individual operators in Areas 2C and 3A. Charter operators also bear advertising, promotional, and support costs, which cannot be quantified with available information. The estimates of gross revenues for representative charter operations in Area 2C and Area 3A were based on the number of charter trips and charter anglers reported in ADF&G saltwater charter logbooks from 2005 through 2010 and on average rates charged for charter trips determined from a sample of individual charter operations in both areas.

As described in the response to Comment 5, the Council and Secretary of Commerce recognize that changing the formula for of allocating halibut to the charter sectors in Areas 2C and 3A under the CSP could result in a smaller allocation to the charter sector at relatively low levels of halibut abundance relative to the status quo GHL program. The Analysis demonstrates that such harvest constraints could result in reduced gross revenues for charter operators. For example, section 2.6 of the Analysis shows that in Area 2C, declines in estimates of gross revenue coincided with a reduction in the daily bag limit for charter anglers in 2009 that was implemented to reduce charter harvest from levels that exceeded the GHL. However, the Analysis also notes that the connection between halibut available to the charter sector and resulting vessel revenues is less direct in the charter sector than in the commercial sector. While management measures governing charter harvest are intended to constrain total catch through their effects on individual anglers' harvests as well as on the demand for charter fishing trips, there are also other factors that affect supply and demand of charter trips, such as the state of the economy in general.

The Council considered the anticipated effects of the CSP on the allocation to the charter sector at all levels of abundance (section 2.5 of the Analysis), and the potential impacts on the charter sector (section 2.6 of the Analysis). The Analysis shows that estimated gross revenues exceeded the average charter halibut permit price in both areas from 2005 through 2010. This was also the case for Area 2C following implementation of the one-fish daily bag limit in 2009.

The Council recommended that the CSP include other measures to mitigate the potential negative economic impacts to the charter sector of a constraining allocation under the CSP. First, the Council identified a responsive process for annually determining management measures for the charter sector. This process will use the most recent halibut stock assessment information, data from the recently completed charter fishing season, and input from charter fishery stakeholders to facilitate a recommendation for a management measure to restrict charter harvest that is intended to limit the sector to its allocation while minimizing negative impacts on charter angler demand by maintaining desirable fishing opportunities. Second, the Council recommended that NMFS authorize the use of halibut IFQ as GAF in the Area 2C and 3A charter halibut fishery to mitigate the negative impacts of halibut harvest constraints in the charter sector by providing a mechanism for charter anglers to increase halibut harvest when their daily bag limit is reduced.

Section 2.6 of the Analysis describes why it is not possible to provide quantitative estimates of the national or regional economic impacts of the alternatives considered with available information. A quantitative economic impact analysis would require information on the contributions to national or regional benefits associated with all sources of commercial removals (commercial, charter, and bycatch in non-directed fisheries), as well as the effects these removals may have on all users of the halibut resource, including unguided sport and subsistence users. This information is not available for the halibut fisheries off Alaska. Additionally, the analysis would require detailed information on costs and expenditures for operators in the commercial and charter fisheries as well as demand for charter trips and angler willingness-to-pay for trips. This information is not available for the halibut fisheries off Alaska.

Comment 121: The CSP will do irreparable harm to tourism-dependent businesses and communities. A variety of charter fishing businesses and tourism support businesses (e.g., airlines, hotels, fish processors, taxis, restaurants) are patronized by charter vessel anglers that will suffer severe economic harm if anglers choose not to return to Alaska to fish for halibut under the CSP. Many charter businesses will be forced to close, which would also result in the closure of supporting businesses in Alaskan communities. The charter halibut fishery benefits Alaskan communities more than the commercial halibut fishery. The CSP will hurt small charter businesses in favor of large commercial halibut fishing businesses.

Response: As described in the response to Comment 136 and in sections 2.6 and 2.7 of the Analysis, both the commercial halibut fishery and the charter halibut fishery contribute to the economic base of coastal communities in Alaska. While it is not possible to quantify or directly compare the economic contributions provided by each sector to regional or local economies with available information, the Council and NMFS have considered the contribution of each fishery to Alaskan communities and the likely impacts of the CSP on affected fishery participants and communities. While CSP allocations to the charter sector may constrain charter harvest at lower levels of abundance, lower catch limits for the commercial halibut fishery at lower halibut abundance levels will also have negative economic impacts on commercial participants (see section 2.6.1.2 of the Analysis). As described in the response to Comment 1, the CSP allocations implemented by this final rule will allow the charter halibut fishery to fully benefit from increases in halibut abundance by receiving larger poundage allocations. NMFS notes that like most charter halibut operations in Areas 2C and 3A, many commercial halibut fishing operations are small businesses as described below in the FRFA in the Classification section in this final rule.

Comment 122: The economic benefit of the commercial sector in Alaska far outweighs the total economic benefit of the charter industry.

Response: Section 2.6 of the Analysis describes why it is not possible to provide quantitative estimates of the national or regional economic impacts of the alternatives considered with available information, including a comparison of the economic impacts of the charter and commercial sectors. As described in the response to Comment 120, the Analysis uses the best available information to describe the costs and benefits of the CSP accruing to the commercial and charter halibut sectors in Areas 2C and 3A. Also see the response to Comment 121.

Comment 123: Charter fishing will be cost-prohibitive under the CSP, especially if charter vessel anglers are forced to buy GAF to augment the bag limit for guided anglers.

Response: NMFS acknowledges that charter vessel anglers may be negatively impacted by charter management measures implemented under the CSP at low levels of halibut abundance. However, as described in the response to Comment 1, the CSP allocations implemented by this final rule are intended to provide charter harvest opportunities that considers historic and present harvest rates. The CSP will allow the charter halibut fishery to fully benefit from increases in halibut abundance by receiving larger poundage allocations. Charter anglers would be negatively impacted at lower levels of halibut abundance if they derive less satisfaction from charter vessel fishing trips on which they can retain fewer halibut or halibut of a smaller size, but the opportunity to harvest halibut is not the only factor affecting the demand for guided saltwater sport charters. Other factors such as overall economic conditions or fuel prices also affect demand for charter vessel fishing trips (see section 1.7.5 of the Analysis). Thus, the demand for charter trips could decline even without additional charter harvest restrictions under the CSP. Section 8.1 of the Analysis describes that charter businesses provide the necessary guiding services, fishing equipment, and knowledge to give charter anglers the opportunity to harvest halibut and other species. Anglers have a number of different reasons for purchasing charter vessel fishing trips and would be impacted differently by reduced or increased catch limits for the charter sector, depending on the allocation and management measures that are in place. Some charter anglers are less interested in taking home a large amount of halibut, because of storage and shipping expenses, for example, and are more interested in the Alaska fishing experience.

NMFS notes that GAF is a voluntary program for anglers who wish to retain additional halibut when the daily bag limit in effect for charter anglers is less than two halibut of any size. As described in the response to Comment 7, the Council did not intend for GAF to provide a mechanism to replace reductions in the charter allocation relative to historical or current harvest levels.

Comment 124: The Council's purpose and need statement for the CSP states that in some areas, community stability may be affected as traditional sport, subsistence, and commercial IFQ fishermen are displaced by CHP holders. It goes on to state that the uncertainty associated with the present situation and the conflicts that are occurring between the various user groups may also be impacting community welfare. How will community stability be affected if the charter halibut fishery, particularly in specific ports, is dramatically reduced or completely eliminated? Does empirical evidence suggest that traditional sport, subsistence, and commercial IFQ fisherman have been displaced by CHP holders since 2011, when the most conservative management measures were adopted?

Response: The anticipated impacts of the alternatives on communities are analyzed in sections 1.7.5, 2.7, 7, and 8.5 of the Analysis. The Council and NMFS recognize that at low levels of halibut abundance, the CSP allocation to the charter sector may constrain harvest relative to historical levels. However, as described in the response to Comment 1, the CSP allocations implemented by this final rule will allow the charter halibut fishery to fully benefit from increases in halibut abundance by receiving larger poundage allocations. The Council considered recent charter harvest levels in both areas when recommending the CSP allocations, including 2011 and 2012, years in which charter anglers in Area 2C were restricted by a daily bag limit of one halibut that was subject to a size limit. Based on the available information for halibut stock levels, recent charter harvests, and the estimated impacts of the CSP on the charter sector in section 2.6 of the Analysis, the Council and NMFS do not anticipate that the charter fishery will be dramatically reduced or eliminated under the CSP. Also see the response to Comment 7.

Comment 125: The king salmon fishery has declined in recent years, hurting charter businesses. The CSP will further hurt charter businesses by restricting halibut harvest.

Response: The Council and NMFS recognize that anglers in Area 2C and Area 3A harvest a number of other species in addition to halibut on charter vessel fishing trips, as described in section 1.7 of the Analysis. At low levels of abundance, the CSP allocation to the charter sector may constrain harvest relative to historic levels. However, as described in the response to Comment 1, the CSP allocations implemented by this final rule will allow the charter halibut fishery to fully benefit from increases in halibut abundance by receiving larger poundage allocations.

Comment 126: The CSP fails to allow anglers the opportunity to access a public resource at an affordable price. The CSP would implement a plan that lessens the freedom of the public to harvest fish for their own dinner tables. Many people choose to hire charter vessel guides to take them fishing for the primary purpose of stocking their freezers to feed themselves and their families. Some choose to hire charters because owning their own boat is too expensive or transporting a boat to Alaska is impractical. Under the CSP, anglers will no longer be able to catch enough fish to justify the expense of a charter trip. They will be forced to either purchase an additional charter trip, or buy commercially caught fish and both of these options are cost prohibitive.

Response: NMFS acknowledges that at low levels of abundance, the CSP allocation to the charter sector may constrain charter harvest relative to historic levels. However, as described in the response to Comment 1, management of the charter fishery under the GHL program resulted in the commercial fishery bearing a disproportionate amount of the declines in halibut exploitable biomass relative to the charter sector. This changing proportional allocation of a fully utilized halibut resource between the sectors under the GHL program created instability between user groups that the Council sought to address with the commercial and charter sector halibut allocations implemented by this final rule. This action is intended to maintain stability, economic viability, and diversity of halibut user groups by addressing allocation conflicts between participants in the commercial and charter halibut fisheries. The Secretary of Commerce has determined that the CSP allocations are consistent with the Council's objectives as described in its problem statement and the purpose and need for the CSP described in section 1.2 of the Analysis.

NMFS notes that charter vessels are not the only way that the public can access the halibut resource. The commercial fishery provides access to halibut to those who prefer to purchase it in grocery stores or restaurants. The subsistence fishery provides access to harvest halibut by those who qualify to conduct subsistence halibut fishing. Unguided recreational fishing also is a means of public access to the halibut resource. This rule does not constrain or limit any of these other means of public access to the halibut resource.

As described in the response to Comment 129, the opportunity to harvest halibut is not the only factor affecting the demand for guided saltwater sport charters and therefore, the cost to anglers of taking a charter vessel fishing trip. Other than acknowledging the potential for reduced demand for charter vessel fishing trips under constraining charter sector catch limits, as was done in the Analysis, NMFS cannot predict the number of charter vessel anglers that will choose to not take a charter vessel fishing trip as a direct result of this final rule.

Comment 127: There is no annual consideration or reciprocity from the commercial sector to the charter sector for loss of business. Should the CSP be implemented, it should be conditional upon annual reimbursement of the losses shown by the charter and affiliated interests.

Response: As described in the response to Comment 7, the Council faced the challenge of balancing historical halibut harvests, economic impacts to the commercial and charter sectors, and the declining halibut biomass in Area 2C and in Area 3A as it developed the CSP. As a result, it is not possible for any allocation consistent with the Council's CSP objectives to make participants in both fisheries whole economically given current halibut abundance levels. Given the lack of information on gross revenues and operating costs for individual charter businesses in Areas 2C and 3A (see section 2.6 of the Analysis), it is not clear how the annual reimbursement mechanism suggested by the commenter would function. However, suggestions for revisions to the CSP could be made to the Council for future consideration.

Comment 128: The CSP benefits non-US companies that pay no taxes at expense of local residents and businesses.

Response: The IFQ Program regulations at § 679.4 governing the commercial halibut fisheries in Area 2C and Area 3A require all halibut and sablefish quota share holders to be U.S. citizens. Although a limited number of charter halibut permits were initially issued to non-US charter businesses based on their history of participation in the Area 2C and Area 3A charter halibut fisheries, regulations at § 300.67(i)(2)(i) specify that only U.S. citizens or a U.S. business with a minimum of 75 percent U.S. ownership are eligible to receive a charter halibut permit by transfer.

NMFS does not have information available to determine the location where taxes are paid. However, most of the commercial and charter operations regulated by the CSP are active in Alaska and Washington (see section 7.1 of the Analysis). Most, if not all, of these businesses are defined as small businesses under the Regulatory Flexibility Act (see FRFA in the Classification section of this rule). This definition has the same meaning as ''small business concern'' which is defined under section 3 of the Small Business Act. The Small Business Act has further defined a ''small business concern'' as one ''organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor.''

Comment 129: Continue to manage the Area 2C and Area 3A charter halibut fishery with the GHL program, even though it has resulted in a reduction in the long-term historic proportion of the halibut fishery available to the commercial sector in those areas. Participants in the commercial halibut fishery and consumers are less negatively impacted by reductions in catch limits than participants in the charter halibut fishery. The market price for halibut usually goes up when the supply goes down, providing for a somewhat stable bottom line for commercial halibut harvesters. Declines in commercial halibut catch limits do not impact consumers because halibut make up only a very small proportion of the fish that Americans eat, and consumers may substitute other white fish from farmed or wild sources. In contrast, the charter sector cannot charge more when charter sector catch limits are reduced.

Response: As described in the response to Comment 1, the Council and NMFS replaced the GHL in Areas 2C and 3A with commercial and charter sector allocations that vary directly with halibut abundance and that balance the differing needs of the charter and commercial halibut fisheries over a wide range of abundance.

Section 8.1 of the Analysis notes that research conducted on the price flexibility of Alaska halibut suggests that changes in ex-vessel price that result from increasing or decreasing the amount of commercial harvest in Areas 2C and 3A under the CSP are expected to be very small. Halibut caught in Area 2C and Area 3A directed commercial fisheries compete with halibut harvested from California to the Bering Sea in a regional and international market. Prices in this market are determined by overall supply, the prices of substitute goods, income, exchange rates, inventories, and other factors. Area 2C and Area 3A commercial fishermen only contribute a part of the overall market supply, and thus a change in their production is unlikely to have an impact on the prices that consumers pay for commercially caught halibut.

Comment 130: Commercially caught halibut is cost prohibitive and of lesser quality than sport-caught fish. The CSP will make commercial halibut less affordable in the marketplace because there will be less competition from charter anglers.

Response: NMFS has no information suggesting that the CSP will make commercial halibut less affordable in the marketplace because there will be less competition from charter anglers, or that the quality of commercial halibut is inferior to that of sport-caught halibut. As described in the response to Comment 129, commercial halibut prices are determined by overall supply, the prices of substitute goods, income, exchange rates, inventories, and other factors. Area 2C and Area 3A commercial fishermen only contribute a part of the overall market supply of halibut, and thus a change in their production is unlikely to have an impact on the prices that consumers pay for commercially caught halibut.

Comment 131: The CSP provides stability for the public's access to sustainable seafood (via markets). The commercial fishery annually provides 44 times more Americans access to the halibut resource than the charter fishery and the global demand for commercial halibut continues to grow.

Response: As described in the response to Comment 129, halibut caught in the Area 2C and Area 3A directed commercial fisheries contribute only a part of the overall market supply in the United States and an even smaller part globally. The Council and the Secretary of Commerce considered the expected impacts of the CSP on consumers of halibut (see section 8.4 of the Analysis).

Comment 132: When commercial fishermen invested in quota shares, they did not buy a guaranteed number of pounds, but rather a share of the allowable catch limit. Charter operators have also made a substantial investment in their businesses and that investment should also be protected.

Response: NMFS acknowledges the comment and agrees that participants in the charter halibut fisheries in Area 2C and Area 3A have made substantial investments in their business operations. NMFS also notes that participants in the commercial halibut fisheries in Areas 2C and 3A have also made substantial investments in their business operations. Section 1.7.1.6 of the Analysis describes the commercial halibut fisheries and explains that the IFQ Program assigns the privilege of harvesting a percentage of the halibut total allowable catches to QS holders, and that these percentages vary annually with changes in allowable harvest levels. As described in the response to Comment 120, the Council and Secretary of Commerce considered the analysis of the costs and benefits of this action accruing to the commercial and charter halibut sectors in Areas 2C and 3A (section 2.6 of the Analysis), and have determined that the CSP is necessary to achieve the halibut fishery management goals of the Council.

Comment 133: The number of sport fishing licenses sold by ADF&G has been declining. The CSP will result in further declines in the number of sport fishing licenses purchased and have negative impacts on the ADF&G budget.

Response: Because factors other than harvest restrictions affect demand for charter vessel fishing trips, NMFS cannot quantify the extent to which constraining charter halibut harvests at low levels of halibut abundance will reduce demand for sport fishing licenses issued for use on charter vessel fishing trips. Declines in demand could occur even without additional charter harvest restrictions when halibut abundance is low. Conversely, NMFS cannot quantify the extent to which increasing charter halibut harvests at high levels of halibut abundance will increase demand for sport fishing licenses and charter trips. NMFS agrees that reductions in the sale of sport fishing licenses may result in reduced revenue to the ADF&G and may have a negative impact on the agency's revenue and budget.

Comment 134: Many IFQ holders have purchased their quota share, which has lost value, while charter operators have no investment in QS. The Area 2C commercial sector has lost 6–7 percent of its allocation to the charter sector under the GHL program. The commenter also provided estimates of the income loss to a commercial QS holder and to the Area 2C commercial fishery as a whole. Participants in both sectors derive income from a public resource, and NMFS must consider the costs to participate in each fishery.

Response: Although NMFS agrees that Area 2C and Area 3A charter halibut operators are not required to invest in QS to maintain their charter halibut operations, NMFS acknowledges that charter halibut operators have made substantial investments in their business operations. Section 2.6.1.1 of the Analysis describes the primary costs associated with charter operations, including the costs of obtaining charter halibut limited access permits. Section 2.6.1.2 of the analysis discusses the economic impacts that catch limit reductions have had on commercial halibut fishery participants in Area 2C and Area 3A. As described in the response to Comment 120, the Council and Secretary of Commerce considered the analysis of the costs and benefits of this action accruing to the commercial and charter halibut sectors in Areas 2C and 3A, and have determined that the CSP is necessary to achieve the halibut fishery management goals of the Council. Also see the response to Comment 138.

Comment 135: The number of bottomfish charter trips has declined significantly between 2006 and 2012 in both Area 2C (19 percent) and Area 3A (20 percent). While Area 2C charter operators blame this decline on more restrictive management measures, the Area 3A management measures have not changed in those years, but the decline in number of trips is similar. This suggests that changing national economic conditions are the driving force behind reduced demand for charter services, not regulatory change.

Response: NMFS agrees that a number of factors, including the harvest restrictions in place for charter vessel anglers, affect demand for charter halibut fishing trips. Also see the response to Comment 120 and section 1.7.5 of the Analysis.

Comment 136: Commercial halibut fishing does not benefit the State of Alaska because the majority of IFQ holders are from out of state.

Response: Based on owners' self-reported business mailing addresses, as of August 1, 2013, more than 77 percent of IFQ holders were designated as Alaskan; however, NMFS makes no effort to independently verify residency. Regardless of the state of residency, charter and commercial fishery operations in Alaska economically benefit their local communities. Like the charter industry, the commercial halibut fishery provides jobs, tax revenue, revenue to local businesses (e.g., marinas, restaurants, stores), and other economic benefits to local Alaskan communities (see section 2.7 of the Analysis). The commercial fishery also benefits the nation with a consistent and reliable supply of halibut.

Comment 137: Since 2004, the Area 2C commercial quotas were cut by 75 percent while the Area 3A commercial quotas have been reduced by 56 percent. These cuts have resulted in substantial economic losses to commercial harvesters, processors, and marketers, as well as reduced access to the halibut resource for consumers. The comparable GHL cuts were 44 percent in Area 2C and 25 percent in Area 3A.

Response: Sections 1.7.1.2 and 2.6.1.2 of the Analysis discuss the impacts of declining halibut exploitable biomass on commercial catch limits and the economic impacts these catch limit reductions have had on commercial halibut fishery participants in Area 2C and Area 3A. As described in the proposed rule and in the response to Comment 1, the Council and NMFS recognize that management of the charter fishery under the GHL program resulted in the commercial fishery bearing a disproportionate amount of the declines in halibut exploitable biomass relative to the charter sector. The Council sought to address this changing proportional allocation of a fully utilized halibut resource between the sectors under the GHL by recommending the CSP allocations implemented by this final rule.

Comment 138: The GHL has resulted in a reallocation of halibut to the charter sector. This reallocation has had a negative economic impact on my family's income as well as on the local economy. When I purchased quota share, I did not anticipate this reallocation to another sector.

Response: The Council and NMFS recognize that management of the charter fishery under the GHL program resulted in the commercial fishery bearing a disproportionate amount of the recent declines in halibut exploitable biomass relative to the charter sector (see response to Comment 1). Section 2.6.1.2 of the analysis discusses the economic impacts these catch limit reductions have had on commercial halibut fishery participants in Area 2C and Area 3A. Section 2.6.1.2 of the analysis presents six gross revenue and QS cost scenarios (three for Area 2C and three for Area 3A), each from 2003 to 2011. The scenarios provide information concerning the changes in revenue streams and QS value that arise from recent changes in halibut prices and declines in commercial catch limits resulting from reduced halibut exploitable biomass.

The analysis shows that in recent years QS holders in Area 2C were estimated to have experienced losses in gross revenues from their holdings. A portion of this decline likely has been offset by increased halibut prices. Despite these price increases, revenues from halibut QS holdings were estimated to have declined in 2011 to substantially less than 2003 levels. Persons who purchased halibut QS, particularly at peak values in the mid-2000s, have seen the value of their holdings decline substantially. The Area 3A scenarios follow a slightly different pattern than the Area 2C scenarios because the magnitude of the decline in the Area 3A exploitable biomass and commercial catch limits is substantially less than the changes in Area 2C. Although increased halibut prices likely have also offset losses in gross revenues for commercial halibut QS holders in Area 3A, the scenarios estimate that QS holders have experienced losses in QS value since 2008. The Council and NMFS considered this information in developing the CSP implemented by this final rule.

Conservation

Comment 139: The CSP does not promote conservation. The proposed rule and Analysis both concede that the CSP will not affect conservation of the halibut stock; rather, the purpose of the rule is allocation of the halibut resource among competing user groups. The Halibut Act requires that any allocation must be reasonably calculated to promote conservation.

Response: Although resolving allocation disputes is an objective of the CSP, NMFS disagrees that the CSP will not promote conservation. The CSP promotes conservation by establishing a more stable allocation between the sectors and fostering a more easily managed charter halibut fishery. Separate accountability for wastage also promotes conservation by encouraging better handling of discarded fish by both the commercial and charter sectors (see responses to Comment 32 and Comment 35).

Comment 140: It seems there is more interest in making sure the charter and commercial sectors are made whole from an economic perspective than preserving the halibut stock.

Response: The CSP establishes Area 2C and Area 3A sector allocations from a combined catch limit (CCL). The CCL is derived by applying a conservative target harvest rate to the best estimate of exploitable biomass (see Figure 1, above), resulting in an appropriately conservative annual catch from the fisheries. See the responses to Comment 139 and Comment 7.

Comment 141: The CSP results in all sectors sharing in the conservation of the halibut at all levels of abundance.

Response: NMFS agrees that under the CSP both the charter and commercial sectors will share in conservation of the halibut resource.

Comment 142: The IPHC's treatment of charter harvest overages of the GHL confirms that halibut conservation is not the issue. Since 2007, the IPHC has deducted the GHL, not actual charter halibut harvest, from the Total CEY to obtain the Fishery CEY.

Response: The IPHC deducted the GHL from the Total CEY in accordance with the Council's domestic allocation policy implemented in the GHL regulations (see the response to Comment 1). The IPHC incorporated charter harvest overages and underages of the GHL into the stock assessment for sustainable management and conservation of the resource as described in the response to Comment 21).

Comment 143: Commercial catch limits have been decreasing not because of increased guided recreational catch, but because the exploitable biomass has been decreasing: This is largely because the IPHC has been setting commercial catch limits that IPHC's scientific staff admits have been too high to be sustainable.

Response: Commercial catch limits have declined in recent years as a result of declining halibut exploitable biomass. The Pacific halibut stock has been declining continuously over much of the last decade as a result of factors including decreasing size-at-age and poor recruitment strengths (see response to Comment 28). The factors resulting in the decreasing size-at-age and poor recruitment strengths are not understood. The IPHC takes a conservative model-based approach in setting the commercial fishery catch limits for the areas in and off Alaska. As described in the ''Catch Sharing Plan for Area 2C and Area 3A'' section above, the IPHC accounts for all removals, including removals in other fisheries, when setting catch limits for the directed commercial IFQ longline fishery. Section 1.7.1 of the Analysis describes the IPHC's stock assessment and harvest policy processes.

Comment 144: The halibut biomass is healthy; therefore, further reductions to the charter fishery are unnecessary.

Response: The Pacific halibut stock has been declining continuously over much of the last decade as a result of factors including decreasing size-at-age and poor recruitment strengths (see response to Comment 28). As described in the response to Comment 1, one of the objectives for the CSP is to establish a comprehensive management program for the charter halibut fisheries in Area 2C and Area 3A with sector allocations that balance the differing needs of the charter and commercial sectors over the wide range of abundance, and that increase or decrease (''float'') with varying levels of halibut abundance.

Comment 145: Both sectors' allocations should be cut in half until the halibut stock recovers.

Response: The Council's rationale for its CSP allocation formula is summarized in the response to Comment 1. The Council recommended CSP allocations to balance historical harvest levels and economic impacts to the charter and commercial fisheries at all halibut stock abundance levels.

Comment 146: The charter halibut fleets in Area 2C and 3A have conserved more than one million pounds of halibut in the last three years through GHL underages.

Response: NMFS acknowledges that charter harvests have been below the GHLs in Area 2C and 3A in recent years and that those underages benefited the stock and all sectors because the biomass estimation for the subsequent year began at a higher level (see response to Comment 21).

Comment 147: The CSP will do long-term harm to society by limiting the public's opportunity to experience the wonders of Alaska, learn about the marine environment, and become advocates for sound fisheries policies.

Response: NMFS disagrees. One of the objectives for the CSP is establishment of sector allocations that balance the differing needs of the charter and commercial sectors over a wide range of halibut abundance, and that float with varying levels of halibut abundance. To accomplish this objective, the Council and NMFS replaced the GHL with sector allocations that vary directly with fluctuations in halibut abundance. The charter sector's allocation will be reduced in years of low abundance, while it will be increased in years of high abundance. Even in years of low abundance, charter anglers will continue to have opportunities to enjoy the outdoor experience from charter vessels in Areas 2C and 3A.

Comment 148: Further restrictions on halibut bag limits for charter vessel anglers will shift fishing pressure to other species like king salmon, lingcod, and rockfish.

Response: NMFS notes that this final rule does not implement any changes to the bag limits that currently apply to charter vessel anglers. The Council and NMFS have taken into account the capability of halibut charter vessels to be used in other fisheries and recognize that anglers aboard charter vessels in Area 2C and Area 3A harvest a number of other species in addition to halibut on charter vessel fishing trips, as described in section 1.7 of the Analysis. ADF&G manages and monitors the sport fisheries for salmon, lingcod, and rockfish, and restrict harvest to meet biological management goals. NMFS does not anticipate the CSP will significantly increase the harvest of these other species (see section 1.7.2.2 of the Analysis).

General

Comment 149: NMFS received several requests to extend the public comment period on the proposed rule. A 45-day comment period was considered inadequate because of the length and complexity of the rule and supporting analysis, and because the comment period coincides with the busy summer fishing season. Commenters requested extensions of various lengths, up to an additional 60 days.

Response: NMFS considered the requests to extend the proposed rule comment period, recognizing the concern of those fishermen who might be out on the water during the comment period. To allow for greater opportunity for public input, NMFS granted an extension for 14 days until August 26, 2013 (78 FR 44920, July 25, 2013). A longer extension would have jeopardized NMFS' ability to prepare and publish the final rule in time to implement the CSP for the 2014 fishing season. In recommending the CSP, the Council urged NMFS to implement the CSP for the 2014 fishing season to provide stability for affected halibut fishery participants.

Comment 150: Anglers and small communities were not given adequate notice or opportunity to comment on the CSP. What steps has NOAA taken to inform the guided angler of the comment period on this regulation?

Response: NMFS believes that the public has been given sufficient notice and ample opportunity to comment on the CSP. The Council first began considering options to manage the charter fishery in the late 1990s, in response to the rapid and steady growth of the charter halibut industry in Areas 2C and 3A. A complete history of charter halibut management was detailed in the preamble of the proposed rule for the Charter Halibut Limited Access Program (74 FR 18178, April 21, 2009) and is not repeated here.

The Council began deliberating allocation options for a CSP for the commercial and charter halibut fisheries in 2006 (*http://alaskafisheries.noaa.gov/npfmc/halibut/charter-management.html*). Since 2006, elements of the CSP have been on the agenda for discussion and Council action at no fewer than 12 Council meetings, where the public was given the opportunity to attend, testify, or submit written comments. Council meeting agenda items are available on the Council's Web site up to nine months in advance. As described in the response to Comment 107, the Council has also formed a number of committees since 1998 to provide management recommendations for the Area 2C and Area 3A charter halibut fisheries.

A proposed rule for a CSP was first published in July 2011, garnering several thousand public comments. NMFS modified this version of the CSP in response to some of those comments. The proposed rule for this revised CSP was published on June 28, 2013 (78 FR 39122). Prior to publication in the **Federal Register**, NMFS issued a press release and posted a notice on its Web page. This press release was distributed by several state and regional news outlets. Both rulemakings garnered wide media coverage. NMFS received a large number of public comments sent from of anglers, commercial harvesters, charter operators, and community interests across a broad geographic range.

Comment 151: Federal regulations do not give the price or value of fish which NMFS requires in the IFQ cost recovery assessment. Publishing such data would help the consumer understand the cost of halibut in the market place.

Response: The proposed rule for the CSP describes how NMFS collects fees directly related to the management, data collection, and enforcement of the IFQ Program, consistent with regulations at § 679.45. Page 39143 of the proposed rule describes that NMFS uses data reported by Registered Buyers to compute annual standard ex-vessel IFQ prices by month and port (or, if confidential, by port group). These standard prices are published in the **Federal Register** each year. The standard prices for the 2012 IFQ fisheries were published on December 4, 2012 (77 FR 71783).

Comment 152: Continue to manage the charter sector to the GHL until the ''pool plan'' can be implemented.

Response: The comment refers to public testimony that the Council received at its October 2012 meeting. The testimony from charter sector representatives indicated that they were developing a proposal intended to supplement the annual CSP allocation of halibut to the Area 2C and 3A charter sectors (pool plan). The representatives indicated that the pool plan proposal would be provided to the Council at a future meeting. Based on the description provided in October 2012, the pool plan would authorize an entity acting on behalf of the charter sector to purchase halibut quota share from commercial halibut fishery participants and hold the QS in a ''common pool'' for harvest in the charter halibut fishery by all anglers. The Council heard testimony that the developers intended for this plan to be an alternative to the GAF program in the future. See the ''Guided Angler Fish (GAF)'' section above for a description of the GAF program and the response to Comment 7 for the Council's rationale for recommending the GAF program. The Council recommended the CSP in October 2012 prior to presentation or analysis of the pool plan proposal; therefore, the pool program was not included among the alternatives considered for the CSP.

As described in the response to Comment 1, the GHL does not meet the Council's allocation objectives for managing the charter halibut fisheries in Areas 2C and 3A. At any point in the future, charter sector representatives can request the Council to consider a pool plan or any proposal to modify the CSP.

Comment 153: The Charter Halibut Limited Access Program has been effective at limiting the charter industry and further constraints are unwarranted at this time. There has not yet been enough time to evaluate the effectiveness of the CHLAP in limiting harvest.

Response: The Council had different halibut management objectives for the CHLAP and the CSP as described in section 1.2 of the Analysis. The Council determined, and NMFS agrees, that both programs are necessary to meet its management objectives for the charter halibut fishery.

NMFS received a number of public comments raising issues outside the scope of this action. These comments included proposals relating to the following issues: Additional regulations governing commercial harvest, subsistence harvest, and unguided recreational harvest; specific management measures to maintain charter harvest within the CSP charter halibut allocations in Areas 2C and 3A; development of a charter halibut IFQ management program; additional regulations limiting the number of guides eligible to provide charter halibut guiding services; additional regulations addressing possible localized depletion of halibut in specific areas; additional regulatory restrictions on halibut bycatch in other directed fisheries; prohibition of sport halibut derbies (fishing contests); regulations limiting ownership and operation of commercial fish processors in Alaska to

Alaskan residents; and delegation of halibut management authority to the State of Alaska. NMFS invites the commenters to raise these issues to the Council for its consideration.

NMFS also received numerous comments recommending approval and implementation of the CSP.

VI. OMB Revisions to Paperwork Reduction Act References in 15 CFR 902.1(b)

Section 3507(c)(B)(i) of the PRA requires that agencies inventory and display a current control number assigned by the Director, OMB, for each agency information collection. 15 CFR 902.1(b) identifies the location of NOAA regulations for which OMB approval numbers have been issued. Because this final rule revises and adds data elements within collections-of-information for recordkeeping and reporting requirements, 15 CFR 902.1(b) is revised to reference correctly the sections resulting from this final rule.

VII. Classification

Section 5(c) of the Northern Pacific Halibut Act of 1982 (Halibut Act, 16 U.S.C. 773c(c)) authorizes the regional fishery management council having authority for a particular geographical area to develop regulations governing fishing for halibut in U.S. Convention waters as long as those regulations are in addition to, and do not conflict with, IPHC regulations. This action is consistent with the Council's authority to develop, and the Secretary of Commerce to approve, such regulations. The Secretary has consulted with the U.S. Coast Guard on this action.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

An RIR/IRFA was prepared to assess costs and benefits of available regulatory alternatives. A copy of the Analysis is available from NMFS (see **ADDRESSES**).

Regulatory Flexibility Act (RFA)

A final regulatory flexibility analysis (FRFA) is required by the Regulatory Flexibility Act. This FRFA incorporates the initial regulatory flexibility analysis (IRFA) prepared for the proposed rule and addresses the applicable requirements of section 604(a) of the RFA. A statement of the need for, and objectives of, this final rule has already been provided earlier in the preamble to this final rule and is not repeated here.

Comments on the IRFA

The proposed rule was published in the **Federal Register** on June 28, 2013 (78 FR 39122). An initial regulatory flexibility analysis (IRFA) was prepared and described in the Classification section of the proposed rule. The public comment period ended on August 26, 2013. NMFS received 4,740 communications raising 198 unique issues, 153 of which were within the scope of this action. Comments 126 through 144 address the economic impact of the rule on small entities. These comments and NMFS' responses are in the sections entitled, ''IV. Changes From the Proposed Rule'' and ''V. Comments and Responses'' of this preamble.

No comments on the proposed rule were filed with NMFS by the Chief Counsel for Advocacy of the Small Business Administration.

Description and Estimate of the Number of Small Entities Regulated by the Action

The universe of directly regulated entities for this action includes (a) holders of one or more charter halibut permits in Area 2C and Area 3A; (b) community quota entities that hold charter halibut permits and are authorized to use GAF; and (c) all commercial halibut quota share holders.

The Small Business Administration (SBA) specifies that for marinas and charter or party vessels, a small business is one with annual receipts less than $7.0 million. The largest of these charter vessel operations, which are lodges, may be considered large entities under SBA standards, but that cannot be confirmed because NMFS does not have or collect economic data on lodges necessary to definitively determine total annual receipts. Thus, all charter vessel operations regulated by the proposed CSP would likely be considered small entities, based on SBA criteria, because they would be expected to have gross revenues of less than $7.0 million on an annual basis.

In October 2012, NMFS published an implementation report for the charter halibut limited access program after all interim permits had been adjudicated and resolved. This report is available at *http://alaskafisheries.noaa.gov/ram/charter/chp_review1012.pdf*. At the time of publication, a total of 972 charter halibut permits had been issued to 356 businesses in Area 2C and 439 businesses in Area 3A. Of these, 372 charter halibut permits in Area 2C and 339 permits in Area 3A are transferable. A charter halibut permit holder may transfer a transferable permit, subject to NMFS approval, to a qualified person at any time. The exact number of charter businesses that would be regulated by the CSP therefore cannot be determined because some businesses hold CHPs in each regulatory area and may be counted twice, and because permits are continually being transferred, sold, or retired, or additional community charter halibut permits are being issued. As of October 2012, 107 community CHPs had been issued to 20 CQEs, and 7 U.S. Military Morale, Welfare, and Recreation Program permits had been issued to 3 permit holders.

Regulations that directly regulate entities representing small, remote communities in Areas 2C and 3A are included in this action. These regulations will authorize communities holding community charter halibut permits or regular charter halibut permits to use GAF as proposed under the CSP. GAF will offer charter vessel anglers in Area 2C or Area 3A an opportunity to harvest halibut in addition to the halibut harvested under the charter halibut management measure, up to the harvest limits in place for unguided sport anglers in that area. Eligibility for community charter halibut permits required that the community be represented by a non-profit community quota entity approved by NMFS. Of the 22 CQEs that formed, 11 Area 2C communities were eligible and each received 4 halibut community CHPs and 9 Area 3A communities were eligible and each received 7 halibut community CHPs. A maximum of 18 communities in Area 2C and 14 communities in Area 3A are eligible to form CQEs and apply for charter halibut permits at any time. Therefore, there is a maximum of 32 eligible community entities that could be authorized by the action to use GAF. All of these eligible communities would be considered small entities under the SBA definitions.

All halibut QS holders are directly regulated entities because cost recovery fees for the GAF program are levied to all QS holders, not just those with quota for Areas 2C and 3A. Commercial halibut QS holders are considered part of the Finfish Fishing industry for SBA purposes. On June 20, 2013, the SBA issued a final rule revising the small business size standards for several industries effective July 22, 2013 (78 FR 37398, June 20, 2013). The rule increased the size standard for Finfish Fishing from $4.0 to 19.0 million.

The IRFA for this action was prepared before these new size standards went into effect. NMFS has reviewed the IRFA prepared for this action in light of the new size standards. Under the old size standard, an estimated 2,737 QS holders were considered small entities, and 65 were classified as large entities. Because there are no data to directly link QS holders with all other fishery revenue they may generate, it is not possible to determine the number of small entities with certainty. However, it is likely that many of the 65 businesses formerly considered large entities may now be considered small entities under the new $19 million standard. If all 65 entities were reclassified as small entities, the maximum number of commercial halibut harvesters classified as small entities and directly regulated by this rule would be 2,802. Therefore, for purposes of this FRFA, all directly regulated entities are considered small entities. With this assumption, the new size standards could increase the number of small entities affected by this final rule. NMFS has identified no additional significant alternatives that accomplish statutory objectives and minimize any significant economic impacts of the proposed rule on small entities.

Description of the Alternatives Considered

A FRFA must describe the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of the Halibut Act and other applicable statues, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency that affect the impact on small entities was rejected.

The status quo alternative (Alternative 1) specifies the GHL as a target amount of halibut that anglers in the charter fishery can harvest in Area 2C and Area 3A. However, charter halibut harvests that exceed the GHL may have a de facto allocation effect of reducing the amount of halibut that may be harvested by the commercial fishery in the following year. Additionally, charter halibut fishery harvests beyond the GHL also can undermine overall harvest strategy goals established by the IPHC for the halibut resource, which affects all users. The primary objectives of the CSP are to define an annual process for allocating halibut between the charter and commercial fisheries in Area 2C and Area 3A, establish allocations that balance the differing needs of the charter and commercial fisheries that vary with changing levels of annual halibut abundance, and specify a process for determining harvest restrictions for charter anglers that are intended to limit harvest to the annual charter fishery catch limit. The status quo does not meet the objectives of the CSP.

The Council considered four alternatives to the status quo for the proposed CSP. Alternatives 2 through 5 all recommend the implementation of a CSP for Areas 2C and 3A with separate accountability by fishery for mortality of discarded fish, and a program to allow charter operators to lease IFQ from participants in the commercial halibut fishery, called the GAF program. Alternatives 2 through 5 all include fixed allocation percentages of a combined commercial and charter catch limit to the charter and commercial halibut fisheries. The Council determined that a fixed percentage allocation best met its objectives with the least impact to affected entities. Additionally, a fixed percentage allocation would be equitable because both the commercial and charter halibut fisheries would have allocations that vary with the abundance of the halibut resource. Thus, both the charter and commercial halibut fisheries would share in the benefits and costs of managing the resource for long-term sustainability under a CCL.

The main differences among Alternatives 2 through 5 are in how the allocation percentages are set. Allocation percentages to the charter halibut fishery are the lowest under Alternative 2 and highest under Alternative 5. Alternatives 2 through 5 also differ in how annual charter halibut harvest restrictions would be implemented.

Alternative 2 included allocation percentages that did not include upward adjustments for the switch from the Statewide Harvest Survey to ADF&G saltwater charter logbooks as the primary data source. Alternative 2 contained a pre-determined and fixed set of harvest restrictions that would have been triggered automatically under the CSP depending on the CCL determined each year by the IPHC. Alternative 2 was not selected because the allocations to the charter halibut fishery were not deemed adequate to support charter fishing operations and the fixed harvest restrictions were determined to be too rigid and did not give managers enough discretion to modify those measures as needed to best achieve harvest objectives and minimize potential adverse economic impact.

The CSP is concerned with the allocation of halibut among user groups composed almost entirely of small entities. Alternatives 3, 4, and 5 vary the allocation between charter operators and commercial fishermen in the halibut fisheries. These alternatives reflect different policy choices that would affect different groups of small entities, but would not differentially impact small entities compared to large entities.

Alternatives 3, 4, and 5 did not prescribe annual charter harvest restrictions as part of the CSP. Instead, under these alternatives, charter harvest restrictions would continue to be set through a separate annual process of Council recommendations to the IPHC. This approach is detailed in the ''Annual Process for Setting Charter Management Measures'' section of the preamble to the proposed rule (78 FR 39122, June 28, 2013). This approach was considered more flexible, responsive to the most recent information available on halibut removals, and allowed greater stakeholder input in the selection of annual harvest restrictions than the pre-determined and fixed set of harvest restrictions included in Alternative 2.

Alternative 3 recommended a CSP with allocations to the charter halibut fishery that were increased from the Alternative 2 allocations to account for catch reporting using the saltwater charter logbook instead of the statewide harvest survey (SWHS). The Council selected Alternative 3 as its preferred alternative for Area 2C. The rationale for selecting Alternative 3 as the preferred alternative for Area 2C is provided in sections 1.6.6 and 1.6.7 of the Analysis and page 39130 of the proposed rule, and is not repeated here.

Alternative 4 would establish allocations for the charter halibut fishery based on Alternative 2, plus an additional 3.5 percent of the CCL at lower CCL levels. Allocations under Alternative 4 were higher than Alternatives 2 and 3, but lower than Alternative 5. The Council selected Alternative 4 as its preferred alternative for Area 3A. The rationale for selecting Alternative 4 as the preferred alternative for Area 3A is provided in sections 1.6.6 and 1.6.7 of the Analysis and page 39130 of the proposed rule, and is not repeated here.

Alternative 5 contained the largest allocations to the charter halibut fishery based on the allocations in Alternative 3, plus an additional 3.5 percent of the CCL. Alternative 5 was not chosen as the Council's preferred alternative because it did not meet the Council's objective to select an allocation that balanced historical and recent harvests by the charter sector.

Reporting and Recordkeeping Requirements

This action imposes new recordkeeping requirements. Applications to transfer between IFQ and GAF will be required to be submitted to, and approved by, NMFS for each transfer from IFQ to GAF. The application will require information about the IFQ permit holder and the charter halibut permit holder, including each permit holder's contact information, the IFQ permit holder's account from which halibut pounds are to be transferred, and the GAF account to which GAF are to be transferred. NMFS will rely on data already collected through the ADF&G saltwater charter logbooks for additional management and enforcement needs. In addition, CQEs eligible to receive community charter halibut permits will be required to submit information to NMFS (1) on the application for a transfer between IFQ and GAF, and (2) regarding the CQE's activity in an annual report by January 31 of the following year. NMFS will require charter vessel guides to record on the GAF permit log the date and length of any GAF halibut caught and kept, immediately upon harvest. NMFS will also require GAF permit holders to report via an online system information about each GAF halibut caught and retained at the end of each fishing trip, and to record the GAF electronic reporting confirmation number on the GAF permit log. The professional skills necessary to comply with the reporting and recordkeeping requirements for small entities impacted by this rule include the ability to read, write, and understand English, and the ability to use a computer and the internet. The recordkeeping and reporting requirements will not likely represent a ''significant'' economic burden on the small entities operating in this fishery.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, NMFS will post a small entity compliance guide on the NMFS Alaska Region Web site: *http://alaskafisheries.noaa.gov/sustainablefisheries/halibut/sport.htm*. Contact NMFS to request a hard copy of the guide.

Paperwork Reduction Act Collection of Information Requirements

This final rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA) and which have been approved by the Office of Management and Budget (OMB). The collections are described and their public reporting burdens are estimated by OMB control number below.

OMB Control No. 0648–0398

Public reporting burden per response is estimated to average 2 hours for the IFQ Permit Holder Fee Submission Form, and 2 hours for the IFQ Registered Buyer Ex-Vessel Value and Volume Report.

OMB Control No. 0648–0575

Public reporting burden per response is estimated to average 4 minutes for ADF&G Saltwater Sport Fishing Charter Trip Logbook entry for vessel guide and submittal; 1 minute per angler for angler signatures of ADF&G Saltwater Sport Fishing Charter Trip Logbook; 1 minute to measure each GAF; 1 minute to record GAF lengths on the GAF permit log; 4 minutes to enter data into the GAF electronic reporting system; and 1 minute to record the GAF electronic reporting confirmation number on the GAF permit log.

OMB Control No. 0648–0592

Public reporting burden per response is estimated to average 1 hour for an Application for Transfer Between IFQ and GAF; and 1 hour for an Application for Transfer Between IFQ and GAF by a Community Quota Entity.

OMB Control No. 0648–0272

The IFQ permit is mentioned in this rule; however, the public reporting burden for the IFQ permit in this collection-of-information is not directly affected by this rule.

Public reporting burden estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see ADDRESSES) and by email to *OIRA_Submission@omb.eop.gov,* or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

This final rule is consistent with Executive Order 12962 as amended September 26, 2008, which required Federal agencies to ensure that recreational fishing is managed as a sustainable activity and is consistent with existing law.

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 300

Administrative practice and procedure, Antarctica, Canada, Exports, Fish, Fisheries, Fishing, Imports, Indians, Labeling, Marine resources, Reporting and recordkeeping requirements, Russian Federation, Transportation, Treaties, Wildlife.

50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: December 6, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 15 CFR part 902 and 50 CFR parts 300 and 679 as follows:

15 CFR Chapter IX

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 et seq.

■ 2. In § 902.1, the table in paragraph (b), under the entry 50 CFR is amended by:

■ a. Removing entries for §§ 679.41(a), (b), (c)(1) through (9), (d) through (f), (g)(1) through (4), (h) through (k), and (m); and 679.42(a)(1)(i) through (ii), (b) through (g), (h)(1), (h)(1)(i), (h)(2), and (h)(2)(i);

■ b. Revising the entries for §§ 300.65(d) and 679.45; and

■ c. Adding in alphanumeric order new entries for §§ 300.65(c)(5); 679.41(a); 679.41(b), (c)(1) through (9), (d) through (f), (g)(1) through (4), (h) through (k), and (m); 679.42(a)(1)(i) through (ii), (b) through (e), (g), (h)(1), (h)(1)(i), (h)(2), and (h)(2)(i); 679.42(f)(1); and 679.42(f)(6).

The additions and revisions read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648–)
* * * * *	* *
50 CFR	
* * * * *	* *
300.65(c)(5)	–0272, –0592, –0665
* * * * *	* *
300.65(d)	–0575, –0592
* * * * *	* *
679.41(a)	–0272, –0592
679.41(b), (c)(1) through (9), (d) through (f), (g)(1) through (4), (h) through (k), and (m)	–0272
* * * * *	* *
679.42(a)(1)(i) through (ii), (b) through (e), (g), (h)(1), (h)(1)(i), (h)(2), and (h)(2)(i)	–0272
679.42(f)(1)	–0272, –0592
679.42(f)(6)	–0272, –0592, –0665
* * * * *	* *
679.45	–0272, –0398, –0592
* * * * *	* *

50 CFR Chapter III

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart E—Pacific Halibut Fisheries

■ 3. The authority citation for part 300, subpart E, continues to read as follows:

Authority: 16 U.S.C. 773–773k.

■ 4. In § 300.61:
■ a. Remove the definition for ''Guideline harvest level (GHL)'';
■ b. Revise the definitions for ''Charter vessel angler'', ''Charter vessel fishing trip'', ''Charter vessel guide'', ''Charter vessel operator'', ''Crew member'', ''Individual Fishing Quota (IFQ)'', and ''Sport fishing guide services''; and
■ c. Add definitions for ''Annual combined catch limit'', ''Annual commercial catch limit'', ''Annual guided sport catch limit'', ''Guided Angler Fish (GAF)'', ''Guided Angler Fish (GAF) permit'', and ''Guided Angler Fish (GAF) permit holder'' in alphabetical order to read as follows:

§ 300.61 Definitions.

* * * * *

Annual combined catch limit, for purposes of commercial and sport fishing in Commission regulatory areas 2C and 3A, means the annual total allowable halibut removals (halibut harvest plus wastage) by persons fishing IFQ and by charter vessel anglers.

Annual commercial catch limit, for purposes of commercial fishing in Commission regulatory areas 2C and 3A, means the annual commercial allocation minus an area-specific estimate of commercial halibut wastage.

Annual guided sport catch limit, for purposes of sport fishing in Commission regulatory areas 2C and 3A, means the annual guided sport allocation minus an area-specific estimate of guided sport halibut wastage.

* * * * *

Charter vessel angler, for purposes of §§ 300.65, 300.66, and 300.67, means a person, paying or non-paying, using the services of a charter vessel guide.

Charter vessel fishing trip, for purposes of §§ 300.65, 300.66, and 300.67, means the time period between the first deployment of fishing gear into the water from a vessel after any charter vessel angler is on board and the offloading of one or more charter vessel anglers or any halibut from that vessel.

Charter vessel guide, for purposes of §§ 300.65, 300.66 and 300.67, means a person who holds an annual sport guide license issued by the Alaska Department of Fish and Game, or a person who provides sport fishing guide services.

Charter vessel operator, for purposes of § 300.65, means the person in control of the vessel during a charter vessel fishing trip.

* * * * *

Crew member, for purposes of §§ 300.65 and 300.67, means an assistant, deckhand, or similar person who works directly under the supervision of, and on the same vessel as, a charter vessel guide or operator of a vessel with one or more charter vessel anglers on board.

* * * * *

Guided Angler Fish (GAF) means halibut transferred within a year from a Commission regulatory area 2C or 3A IFQ permit holder to a GAF permit that is issued to a person holding a charter halibut permit, community charter halibut permit, or military charter halibut permit for the corresponding area.

Guided Angler Fish (GAF) permit means an annual permit issued by the National Marine Fisheries Service pursuant to § 300.65(c)(5)(iii).

Guided Angler Fish (GAF) permit holder means the person identified on a GAF permit.

* * * * *

Individual Fishing Quota (IFQ), for purposes of this subpart, means the annual catch limit of halibut that may be harvested by a person who is lawfully allocated a harvest privilege for a specific portion of the annual commercial catch limit of halibut.

* * * * *

Sport fishing guide services, for purposes of §§ 300.65 and 300.67, means assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by being on board a vessel with such person during any part of a charter vessel fishing trip. Sport fishing guide services do not include services provided by a crew member.

* * * * *

■ 5. In § 300.65, revise paragraphs (b), (c), and (d) to read as follows:

§ 300.65 Catch sharing plan and domestic management measures in waters in and off Alaska.

* * * * *

(b) The catch sharing plan for Commission regulatory area 4 allocates the annual commercial catch limit among Areas 4C, 4D, and 4E and will be adopted by the Commission as annual management measures and published in the **Federal Register** as required in § 300.62.

(c) *Catch sharing plan (CSP) for Commission Regulatory Areas 2C and 3A*—(1) *General.* The catch sharing plan for Commission regulatory areas 2C and 3A:

(i) Allocates the annual combined catch limit for Commission regulatory areas 2C and 3A in order to establish the annual commercial catch limit and the annual guided sport catch limit for the halibut commercial fishing and sport fishing seasons, pursuant to paragraphs (c)(3) and (4) of this section; and

(ii) Authorizes the use of Commission regulatory areas 2C and 3A halibut IFQ as guided angler fish (GAF) for harvest by charter vessel anglers in the corresponding area, pursuant to paragraph (c)(5) of this section.

(2) *Implementation.* The Commission regulatory areas 2C and 3A CSP annual combined catch limits, annual commercial catch limits, and annual guided sport catch limits are adopted by the Commission as annual management measures and published by NMFS in the **Federal Register** as required in § 300.62.

(3) *Annual commercial catch limits.* (i) The Commission regulatory areas 2C and 3A annual commercial catch limits are determined by subtracting wastage from the allocations in Tables 1 and 2 of this subpart E, adopted by the Commission as annual management measures, and published in the **Federal Register** as required in § 300.62.

(ii) Commercial fishing in Commission regulatory areas 2C and 3A is governed by the Commission's annual management measures and by regulations at 50 CFR part 679, subparts A, B, D, and E.

(4) *Annual guided sport catch limits.* (i) The Commission regulatory areas 2C and 3A annual guided sport catch limits are determined by subtracting wastage from the allocations in Tables 3 and 4 of this subpart E, adopted by the Commission as annual management measures, and published in the **Federal Register** as required in § 300.62.

(ii) Sport fishing by charter vessel anglers in Commission regulatory areas 2C and 3A is governed by the Commission's annual management measures and by regulations at 50 CFR part 300, subparts A and E.

(5) *Guided Angler Fish (GAF).* This paragraph (§ 300.65(c)(5)) governs the transfer of Commission regulatory areas 2C and 3A halibut between individual fishing quota (IFQ) and guided angler fish (GAF), the issuance of GAF permits, and GAF use.

(i) *General.* (A) GAF is derived from halibut IFQ that is transferred from a Commission regulatory area 2C or 3A IFQ permit holder's account held by a person who also holds quota share (QS), as defined in § 679.2 of this title, to a GAF permit holder's account for the same regulatory area.

(B) A GAF permit authorizes a charter vessel angler to retain GAF that are caught in the Commission regulatory area specified on a GAF permit:

(*1*) During the sport halibut fishing season adopted by the Commission as annual management measures and published in the **Federal Register** as required in § 300.62, and

(*2*) Subject to the GAF use restrictions at paragraphs (c)(5)(iv)(A) through (K) of this section.

(C) NMFS will return unharvested GAF to the IFQ permit holder's account from which the GAF were derived on or after fifteen calendar days prior to the closing of the commercial halibut fishing season each year, subject to paragraph (c)(5)(ii) of this section and underage provisions at § 679.40(e) of this title.

(ii) *Transfer Between IFQ and GAF*—(A) *General.* A transfer between IFQ and GAF means any transaction in which halibut IFQ passes between an IFQ permit holder and a GAF permit holder as:

(*1*) A transfer of IFQ to GAF, in which halibut IFQ equivalent pounds, as defined in § 679.2 of this title, are transferred from a Commission regulatory area 2C or 3A IFQ permit account, converted to number(s) of GAF as specified in paragraph (c)(5)(ii)(E) of this section, and assigned to a GAF permit holder's account in the same management area;

(*2*) A transfer of GAF to IFQ, in which GAF in number(s) of fish are transferred from a GAF permit holder's account in Commission regulatory area 2C or 3A, converted to IFQ equivalent pounds as specified in paragraph (c)(5)(ii)(E) of this section, and assigned to the same IFQ permit holder's account from which the GAF were derived; or

(*3*) The return of unharvested GAF by NMFS to the IFQ permit holder's account from which it was derived, on or after 15 calendar days prior to the closing of the commercial halibut fishing season.

(B) *Transfer procedure*—(*1*) *Application for Transfer Between IFQ and GAF.* A transfer between IFQ and GAF requires Regional Administrator review and approval of a complete Application for Transfer Between IFQ and GAF. Both the transferor and the transferee are required to complete and sign the application. Transfers will be conducted via methods approved by NMFS. The Regional Administrator shall provide an Application for Transfer Between IFQ and GAF on the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov/ram/default.htm.* An Application for Transfer Between IFQ and GAF is not required for the return of unharvested GAF by NMFS to the IFQ permit holder's account from which it was derived, 15 calendar days prior to the closing of the commercial halibut fishing season for that year.

(*2*) *Application timing.* The Regional Administrator will not approve any Application for Transfer Between IFQ and GAF before annual IFQ is issued for each year or after one month prior to the closing of the commercial fishing season for that year. Applications to transfer GAF to IFQ will be accepted from August 1 through August 31 only.

(*3*) *Transfer due to court order, operation of law, or as part of a security agreement.* NMFS may approve an Application for Transfer Between IFQ and GAF to return GAF to the IFQ permit holder's account from which it derived pursuant to a court order, operation of law, or a security agreement.

(*4*) *Notification of decision on application.* (*i*) Persons who submit an Application for Transfer Between IFQ and GAF to the Regional Administrator will receive notification of the Regional Administrator's decision to approve or disapprove the application for transfer.

(*ii*) If an Application for Transfer Between IFQ and GAF is disapproved, NMFS will provide the reason(s) in writing by mail, posted on the date of that decision.

(*iii*) Disapproval of an Application for Transfer Between IFQ and GAF may be appealed pursuant to § 679.43 of this title.

(*iv*) The Regional Administrator will not approve a transfer between IFQ and GAF on an interim basis if an applicant appeals a disapproval of an Application for Transfer Between IFQ and GAF pursuant to § 679.43 of this title.

(*5*) *IFQ and GAF accounts.* (*i*) Accounts affected by either a Regional Administrator-approved Application for Transfer Between IFQ and GAF or the return of unharvested GAF to IFQ on or after 15 calendar days prior to the closing of the commercial halibut fishing season for that year will be adjusted on the date of approval or return. Applications for Transfer Between IFQ and GAF that are transfers of GAF to IFQ that have been approved by the Regional Administrator will be completed not earlier than September 1. Any necessary permits will be sent with the notification of the Regional Administrator's decision on the Application for Transfer Between IFQ and GAF.

(*ii*) Upon approval of an Application for Transfer Between IFQ and GAF for an initial transfer from IFQ to GAF, NMFS will establish a new GAF account for the GAF applicant's account and issue the resulting new GAF and IFQ permits. If a GAF account already exists from a previous transfer from the same IFQ account in the corresponding management area in that year, NMFS will modify the GAF recipient's GAF account and the IFQ transferor's permit account and issue modified GAF and IFQ permits upon approval of an Application for Transfer Between IFQ and GAF.

(*iii*) On or after 15 calendar days prior to the closing of the commercial halibut fishing season, NMFS will convert unharvested GAF from a GAF permit holder's account back into IFQ equivalent pounds as specified in paragraph (c)(5)(ii)(E)(*2*) of this section, and return the resulting IFQ equivalent pounds to the IFQ permit holder's account from which the GAF were derived, unless prevented by regulations at 15 CFR part 904.

(C) *Complete application.* Applicants must submit a completed Application for Transfer Between IFQ and GAF to the Regional Administrator as instructed on the application. NMFS will notify applicants with incomplete applications of the specific information necessary to complete the application.

(D) *Application for Transfer Between IFQ and GAF approval criteria.* An Application for Transfer Between IFQ and GAF will not be approved until the Regional Administrator has determined that:

(*1*) The person applying to transfer IFQ to GAF or receive IFQ from a transfer of GAF to IFQ:

(*i*) Possesses at least one unit of halibut quota share (QS), as defined in § 679.2 of this title, in the applicable Commission regulatory area, either Area 2C or Area 3A, for which the transfer of IFQ to GAF is requested;

(*ii*) Has been issued an annual IFQ Permit, as defined in § 679.4(d)(1) of this title, for the Commission regulatory area corresponding to the person's QS holding, either Area 2C or Area 3A, resulting from that halibut QS; and

(*iii*) Has an IFQ permit holder's account with an IFQ amount equal to or greater than amount of IFQ to be transferred in the Commission regulatory area, either Area 2C or Area 3A, for which the transfer of IFQ to GAF is requested.

(*2*) The person applying to receive or transfer GAF possesses a valid charter halibut permit, community charter halibut permit, or military charter halibut permit in the Commission regulatory area (Area 2C or Area 3A) that corresponds to the IFQ permit area from or to which the IFQ will be transferred.

(*3*) For a transfer of IFQ to GAF:

(*i*) The transfer between IFQ and GAF must not cause the GAF permit issued to exceed the GAF use limits in paragraphs (c)(5)(iv)(H)(*1*) and (*2*) of this section;

(*ii*) The transfer must not cause the person applying to transfer IFQ to exceed the GAF use limit in paragraph (c)(5)(iv)(H)(*3*) of this section; and

(*iii*) There must be no fines, civil penalties, sanctions, or other payments due and owing, or outstanding permit sanctions, resulting from Federal fishery violations involving either person or permit.

(*4*) If a Community Quota Entity (CQE), as defined in § 679.2 of this title, submits a ''Community Quota Entity Application for Transfer Between Individual Fishing Quota (IFQ) and Guided Angler Fish (GAF),'' the application will not be approved until the Regional Administrator has determined that:

(*i*) The CQE applying to transfer IFQ to GAF is eligible to hold IFQ on behalf of the eligible community in Commission regulatory area 2C or 3A designated in Table 21 to 50 CFR part 679;

(*ii*) The CQE applying to transfer IFQ to GAF has received notification of approval of eligibility to receive IFQ for that community as described in § 679.41(d)(1) of this title;

(*iii*) The CQE applying to receive GAF from a Commission regulatory area 2C or 3A IFQ permit holder holds one or more charter halibut permits or community charter halibut permits for the corresponding area; and

(*iv*) The CQE applying to transfer between IFQ and GAF has submitted a complete annual report(s) as required by § 679.5(t) of this title.

(E) *Conversion between IFQ and GAF*—(*1*) *General.* An annual conversion factor will be calculated to convert between net pounds (whole number, no decimal points) of halibut IFQ and number(s) of GAF (whole number, no decimal points) for Area 2C and Area 3A. This conversion factor will be posted on the NMFS Alaska Region Web site before the beginning of each commercial halibut fishing season.

(*2*) *Conversion calculation.* The net pounds of IFQ transferred to or from an IFQ permit holder in Commission regulatory area 2C or 3A will be equal to the number(s) of GAF transferred to or from the GAF account of a GAF permit holder in the corresponding area, multiplied by the estimated average net weight determined as follows. For the first calendar year after the effective date of this rule, the average net weight will be estimated for all halibut harvested by charter vessel anglers during the most recent year without a size limit in effect. After the first calendar year after the effective date of this rule, the average net weight will be estimated from the average length of GAF retained in that area during the previous year as reported to RAM via the GAF electronic reporting system. If no GAF were harvested in a year, the conversion factor will be calculated using the same method as for the first calendar year after the effective date of this rule. NMFS will round up to the nearest whole number (no decimals) when transferring IFQ to GAF and when transferring GAF to IFQ. Expressed algebraically, the conversion formula is:

IFQ net pounds = (number of GAF × average net weight).

(*3*) The total number of net pounds converted from unharvested GAF and transferred to the IFQ permit holder's account from which it derived cannot exceed the total number of net pounds NMFS transferred from the IFQ permit holder's account to the GAF permit holder's account for that area in the current year.

(iii) *Guided Angler Fish (GAF) permit*—(A) *General.* (*1*) A GAF permit authorizes a charter vessel angler to catch and retain GAF in the specified Commission regulatory area, subject to the limits in paragraphs (c)(5)(iv)(A) through (K) of this section, during a charter vessel fishing trip authorized by the charter halibut permit, community charter halibut permit, or military charter halibut permit that is designated on the GAF permit.

(*2*) A GAF permit authorizes a charter vessel angler to catch and retain GAF in the specified Commission regulatory area from the time of permit issuance until any of the following occurs:

(*i*) The amount of GAF in the GAF permit holder's account is zero;

(*ii*) The permit expires at 11:59 p.m. (Alaska local time) on the day prior to 15 days prior to the end of the commercial halibut fishing season for that year;

(*iii*) NMFS replaces the GAF permit with a modified GAF permit following NMFS approval of an Application for Transfer Between IFQ and GAF; or

(*iv*) The GAF permit is revoked or suspended under 15 CFR part 904.

(*3*) A GAF permit is issued for use in a Commission regulatory area (2C or 3A) to the person who holds a valid charter halibut permit, community charter halibut permit, or military charter halibut permit in the corresponding Commission regulatory area. Regulations governing issuance, transfer, and use of charter halibut permits are located in § 300.67.

(*4*) A GAF permit is assigned to only one charter halibut permit, community charter halibut permit, or military charter halibut permit held by the GAF permit holder in the corresponding Commission regulatory area (2C or 3A).

(*5*) A legible copy of a GAF permit and the assigned charter halibut permit, community charter halibut permit, or military charter halibut permit appropriate for the Commission regulatory area (2C or 3A) must be carried on board the vessel used to harvest GAF at all times that such fish are retained on board and must be presented for inspection on request of any authorized officer.

(*6*) No person may alter, erase, mutilate, or forge a GAF permit or document issued under this section (§ 300.65(c)(5)(iii)). Any such permit or document that has been intentionally altered, erased, mutilated, or forged is invalid.

(*7*) GAF permit holders must retain GAF permit(s) and associated GAF permit logs for two years after the end of the fishing year for which the GAF permit(s) was issued and make the GAF permit available for inspection upon the request of an authorized officer (as defined in Commission regulations).

(B) *Issuance.* The Regional Administrator will issue a GAF permit upon approval of an Application to Transfer Between IFQ and GAF.

(C) *Transfer.* GAF authorized by a GAF permit under this paragraph (§ 300.65(c)(5)(iii)) are not transferable to another GAF permit, except as provided under paragraph (c)(5)(ii) of this section.

(iv) *GAF use restrictions.* (A) A charter vessel angler may harvest GAF only on board a vessel on which the operator has on board a valid GAF permit and the valid charter halibut permit, community charter halibut permit, or military charter halibut permit assigned to the GAF permit for the area of harvest.

(B) The total number of GAF on board a vessel cannot exceed the number of unharvested GAF in the GAF permit holder's GAF account at the time of harvest.

(C) The total number of halibut retained by a charter vessel angler harvesting GAF cannot exceed the sport fishing daily bag limit in effect for unguided sport anglers at the time of harvest adopted by the Commission as annual management measures and published in the **Federal Register** as required in § 300.62.

(D) Retained GAF are not subject to any length limit implemented by the Commission's annual management measures and published in the **Federal Register** as required in § 300.62, if applicable.

(E) Each charter vessel angler retaining GAF must comply with the halibut possession requirements adopted by the Commission as annual management measures and published in the **Federal Register** as required in § 300.62.

(F) The charter vessel guide must ensure that each charter vessel angler complies with paragraphs (c)(5)(iv)(A) through (E) of this section.

(G) The charter vessel guide must immediately remove the tips of the upper and lower lobes of the caudal (tail) fin to mark all halibut caught and retained as GAF, and if the halibut is filleted, the entire carcass, with head and tail connected as a single piece, must be retained on board the vessel until all fillets are offloaded.

(H) Except as provided in paragraph (c)(5)(iv)(I) of this section, during the halibut sport fishing season adopted by the Commission as annual management measures and published in the **Federal Register** as required in § 300.62, the following GAF use and IFQ transfer limits shall apply. GAF use limits do not apply to military charter halibut permits.

(*1*) No more than 400 GAF may be assigned to a GAF permit that is assigned to a charter halibut permit or community charter halibut permit endorsed for six (6) or fewer charter vessel anglers in a year,

(*2*) No more than 600 GAF may be assigned to a GAF permit that is assigned to a charter halibut permit endorsed for more than six (6) charter vessel anglers in a year; and

(*3*) In Commission regulatory area 2C, a maximum of 1,500 pounds or ten (10) percent, whichever is greater, of the start year fishable IFQ pounds for an IFQ permit, may be transferred from IFQ to GAF. In Commission regulatory area 3A, a maximum of 1,500 pounds or fifteen (15) percent, whichever is greater, of the start year fishable IFQ pounds for an IFQ permit, may be transferred from IFQ to GAF. Start year fishable pounds is the sum of IFQ equivalent pounds, as defined in § 679.2 of this title, for an area, derived from QS held, plus or minus adjustments made to that amount pursuant to § 679.40(d) and (e) of this title.

(I) The halibut QS equivalent of net pounds of halibut IFQ that is transferred to GAF is included in the computation of halibut QS use caps in § 679.42(f)(1)(i) and (ii) of this title.

(J) A CHP holder receiving GAF from a CQE is subject to § 679.42(f)(6) of this title. For a CHP holder who receives GAF from a CQE, the net poundage equivalent of all halibut IFQ received as GAF is included in the computation of that person's IFQ halibut holdings in § 679.42(f)(6) of this title.

(K) Applicability of GAF use restrictions to CQEs. The GAF use restrictions in paragraph (c)(5)(iv)(H) of this section do not apply if:

(*1*) A CQE transfers IFQ as GAF to a GAF permit that is assigned to one or more charter halibut permits held by that CQE or community charter halibut permits held by that CQE;

(*2*) A CQE transfers IFQ as GAF to another CQE holding one or more charter halibut permits or community charter halibut permits; or

(*3*) A CQE transfers IFQ as GAF to a GAF permit that is assigned to a charter halibut permit held by an eligible community resident (as defined at § 679.2) of that CQE community, as defined for purposes of the Catch Sharing Plan for Commission regulatory areas 2C and 3A in § 679.2 of this title, holding one or more charter halibut permits.

(d) *Charter vessels in Commission regulatory area 2C and 3A*—(1) *General requirements*—(i) *Logbook submission.* For a charter vessel fishing trip during which halibut were caught and retained on or after the first Monday in April and on or before December 31, Alaska Department of Fish and Game (ADF&G) Saltwater Sport Fishing Charter Trip Logbook data sheets must be submitted to the ADF&G and postmarked or received no later than 14 calendar days after the Monday of the fishing week (as defined in 50 CFR 300.61) in which the halibut were caught and retained. Logbook sheets for a charter vessel fishing trip during which halibut were caught and retained on January 1 through the first Sunday in April, must be submitted to the ADF&G and postmarked or received no later than the second Monday in April.

(ii) The charter vessel guide is responsible for complying with the reporting requirements of this paragraph (d). The person whose business was assigned an Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook is responsible for ensuring that the charter vessel guide complies with the reporting requirements of this paragraph (d).

(2) *Retention and inspection of logbook.* A person who is required to provide information pursuant to paragraph (d)(4) of this section, or whose business was assigned an Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook and whose charter vessel anglers retain halibut is required to:

(i) Retain all logbook data pages showing halibut harvest for 2 years after the end of the fishing year for which the logbook was issued, and

(ii) Make the logbook available for inspection upon the request of an authorized officer (as defined in Commission regulations).

(3) *Charter vessel guide and crew restriction in Commission regulatory areas 2C and 3A.* A charter vessel guide, charter vessel operator, or crew member may not catch and retain halibut during a charter vessel fishing trip in Commission regulatory area 2C or 3A while on a vessel with charter vessel anglers on board.

(4) *Recordkeeping and reporting requirements in Commission regulatory area 2C and 3A*—(i) *General requirements.* Each charter vessel angler and charter vessel guide on board a vessel in Commission regulatory area 2C or 3A must comply with the following recordkeeping and reporting requirements, except as specified in paragraph (d)(4)(iii)(C) of this section, by the end of the calendar day or by the end of the charter vessel fishing trip, whichever comes first, unless otherwise specified:

(ii) *Logbook reporting requirements*—(A) *Charter vessel angler signature requirement.* Each charter vessel angler who retains halibut caught in Commission regulatory area 2C or 3A must acknowledge that his or her name, license number (if required), and number of halibut retained (kept) are recorded correctly by signing the Alaska Department of Fish and Game Saltwater Charter Logbook data sheet on the line that corresponds to the angler's information.

(B) *Charter vessel guide requirements.* If halibut were caught and retained in Commission regulatory area 2C or 3A, the charter vessel guide must record the following information (see paragraphs (d)(4)(ii)(B)(*1*) through (*10*) of this section) in the Alaska Department of Fish and Game Saltwater Charter Logbook:

(*1*) *Guide license number.* The Alaska Department of Fish and Game sport fishing guide license number held by the charter vessel guide who certified the logbook data sheet.

(*2*) *Date.* Month and day for each charter vessel fishing trip taken. A separate logbook data sheet is required for each charter vessel fishing trip if two or more trips were taken on the same day. A separate logbook data sheet is required for each calendar day that halibut are caught and retained during a multi-day trip. A separate logbook sheet is also required if more than one charter halibut permit is used on a trip.

(*3*) *Charter halibut permit (CHP) number.* The NMFS CHP number(s) authorizing charter vessel anglers on board the vessel to catch and retain halibut.

(*4*) *Guided Angler Fish (GAF) permit number.* The NMFS GAF permit number(s) authorizing charter vessel anglers on board the vessel to harvest GAF.

(*5*) *Statistical area.* The primary Alaska Department of Fish and Game statistical area code in which halibut were caught and retained.

(*6*) *Angler sport fishing license number and printed name.* Before a charter vessel fishing trip begins, record the first and last name of each paying or non-paying charter vessel angler on board that will fish for halibut. For each angler required to be licensed, record the Alaska Sport Fishing License number for the current year, resident permanent license number, or disabled veteran license number. For youth anglers not required to be licensed, record the word ''youth'' in place of the license number.

(*7*) *Number of halibut retained.* For each charter vessel angler, record the total number of non-GAF halibut caught and kept.

(*8*) *Number of GAF retained.* For each charter vessel angler, record the total number of GAF kept.

(*9*) *Guide signature.* The charter vessel guide acknowledges that the recorded information is correct by signing the logbook data sheet.

(*10*) *Angler signature.* The charter vessel guide is responsible for ensuring that charter vessel anglers that retain halibut comply with the signature requirements at paragraph (d)(4)(ii)(A) of this section.

(iii) *GAF reporting requirements*—(A) *General.* (*1*) Upon retention of a GAF halibut, the charter vessel guide must immediately record on the GAF permit log (on the back of the GAF permit) the date that the fish was caught and retained and the total length of that fish as described in paragraphs (d)(4)(iii)(D)(*5*) and (d)(4)(iii)(D)(*7*) of this section.

(*2*) In addition to the recordkeeping and reporting requirements in paragraphs (d)(4)(i) and (ii) of this section, a GAF permit holder must use the NMFS-approved electronic reporting system on the Alaska Region Web site at *http://alaskafisheries.noaa.gov/* to submit a GAF landings report.

(*3*) A GAF permit holder must submit a GAF landings report by 11:59 p.m. (Alaska local time) on the last calendar day of a fishing trip for each day on which a charter vessel angler retained GAF authorized by the GAF permit held by that permit holder.

(*4*) If a GAF permit holder is unable to submit a GAF landings report due to hardware, software, or Internet failure for a period longer than the required reporting time, or a correction must be made to information already submitted, the GAF permit holder must contact NOAA Office of Law Enforcement, Juneau, AK, at 800–304–4846 (Select Option 1).

(B) *Electronic Reporting of GAF.* A GAF permit holder must obtain, at his or her own expense, the technology to submit GAF landing reports to the NMFS-approved reporting system for GAF landings.

(C) *NMFS-Approved Electronic Reporting System.* The GAF permit holder agrees to the following terms (see paragraphs (d)(4)(iii)(C)(*1*) through (*3*) of this section):

(*1*) To use any NMFS online service or reporting system only for authorized purposes;

(*2*) To safeguard the NMFS Person Identification Number and password to prevent their use by unauthorized persons; and

(*3*) To accept the responsibility of and acknowledge compliance with § 300.4(a) and (b), § 300.65(d), and § 300.66(p) and (q).

(D) *Information entered for each GAF caught and retained.* The GAF permit holder must enter the following information for each charter vessel fishing trip in which GAF were retained under the authorization of the permit holder's GAF permit into the NMFS-approved electronic reporting system (see paragraphs (d)(4)(iii)(D)(*1*) through (*9*) of this section) by 11:59 p.m. (Alaska local time) on the last day of a charter fishing trip in which a charter vessel angler retained GAF:

(*1*) Logbook number from the Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook.

(*2*) Vessel identification number for vessel on which GAF were caught and retained:

(*i*) State of Alaska issued boat registration (AK number), or

(*ii*) U.S. Coast Guard documentation number.

(*3*) GAF permit number under which GAF were caught and retained.

(*4*) Alaska Department of Fish and Game sport fishing guide license number held by the charter vessel guide who certified the logbook data sheet.

(*5*) Date that GAF was caught and retained.

(*6*) Number of GAF caught and retained.

(*7*) Length of each GAF caught and retained. Halibut lengths are measured in inches in a straight line from the anterior-most tip of the lower jaw with the mouth closed to the extreme end of the middle of the tail.

(*8*) Community charter halibut permit only: Community or Port where the charter vessel fishing trip began (i.e., where charter vessel anglers boarded the vessel).

(*9*) Community charter halibut permit only: Community or Port where the charter vessel fishing trip ended (i.e., where charter vessel anglers or fish were offloaded from the vessel).

(E) *Properly reported landing.* (*1*) The GAF permit holder is responsible for ensuring that all GAF harvested on board a vessel are debited from the GAF permit holder's account under which the GAF were retained.

(*2*) A GAF landing confirmation number issued by the NMFS-approved electronic reporting system and recorded by the GAF permit holder on the GAF permit log used to record the dates and lengths of retained GAF, as required in paragraph (d)(4)(iii)(A)(*1*) of this section, constitutes confirmation that the GAF permit holder's GAF landing is properly reported and the GAF permit holder's account is properly debited.

(*3*) Instructions for correcting a submitted GAF landing electronic report are at (d)(4)(iii)(A)(*4*) of this section.

* * * * *

■ 6. In § 300.66:

■ a. Redesignate paragraphs (i) through (v) as paragraphs (j) through (w), respectively;

■ b. Revise paragraph (h) introductory text and newly redesignated paragraphs (n), and (s) through (w); and

■ c. Add paragraph (i) to read as follows:

§ 300.66 Prohibitions.

* * * * *

(h) Conduct subsistence fishing for halibut while commercial fishing or sport fishing, as defined in § 300.61, from the same vessel on the same calendar day, or possess on board a vessel, halibut harvested while subsistence fishing with halibut harvested while commercial fishing or sport fishing, except that persons authorized to conduct subsistence fishing under § 300.65(g), and who land their total annual harvest of halibut:

* * * * *

(i) Conduct commercial and sport fishing for halibut, as defined in § 300.61, from the same vessel on the same calendar day.

* * * * *

(n) Exceed any of the harvest or gear limitations specified at § 300.65(c)(5) or adopted by the Commission as annual management measures and published in the **Federal Register** as required in § 300.62.

* * * * *

(s) Be an operator of a vessel in Commission regulatory area 2C or 3A without an original valid charter halibut permit for the regulatory area in which the vessel is operating when one or more charter vessel anglers are on board that are catching and retaining halibut.

(t) Be an operator of a vessel in Commission regulatory area 2C or 3A with more charter vessel anglers on board catching and retaining halibut than the total angler endorsement number specified on the charter halibut permit or permits on board the vessel.

(u) Be an operator of a vessel in Commission regulatory area 2C or 3A with more charter vessel anglers on board catching and retaining halibut than the angler endorsement number specified on the community charter halibut permit or permits on board the vessel.

(v) Be an operator of a vessel on which one or more charter vessel anglers on board are catching and retaining halibut in Commission regulatory areas 2C and 3A during one charter vessel fishing trip.

(w) Be an operator of a vessel in Commission regulatory area 2C or 3A with one or more charter vessel anglers on board that are catching and retaining halibut without having on board the vessel a State of Alaska Department of Fish and Game Saltwater Charter Logbook that specifies the following:

(1) The person named on the charter halibut permit or permits being used on board the vessel;

(2) The charter halibut permit or permits number(s) being used on board the vessel; and

(3) The name and State issued boat registration (AK number) or U.S. Coast Guard documentation number of the vessel.

■ 7. In § 300.67:

■ a. Redesignate paragraphs (i)(2)(v) and (i)(2)(vi) as (i)(2)(vi) and (i)(2)(vii), respectively; and

■ b. Add paragraph (i)(2)(v) to read as follows:

§ 300.67 Charter halibut limited access program.

* * * * *

(i) * * *

(2) * * *

(v) The GAF permit is not assigned to a charter halibut permit for which the GAF account contains unharvested GAF, pursuant to § 300.65 (c)(5)(iii)(A)(*3*) and (*4*);

* * * * *

■ 8. Add Tables 1 through 4 to subpart E of part 300 to read as follows:

TABLE 1 TO SUBPART E OF PART 300—DETERMINATION OF COMMISSION REGULATORY AREA 2C ANNUAL COMMERCIAL ALLOCATION FROM THE ANNUAL COMBINED CATCH LIMIT FOR HALIBUT

If the area 2C annual combined catch limit (CCL) in net pounds is:	then the area 2C annual commercial allocation is:
<5,000,000 lb	81.7% of the Area 2C CCL.
≥5,000,000 and ≤5,755,000 lb	the Area 2C CCL minus a fixed 915,000-lb allocation to the charter halibut fishery.
>5,755,000 lb	84.1% of the Area 2C CCL.

TABLE 2 TO SUBPART E OF PART 300—DETERMINATION OF COMMISSION REGULATORY AREA 3A ANNUAL COMMERCIAL ALLOCATION FROM THE ANNUAL COMBINED CATCH LIMIT FOR HALIBUT

If the area 3A annual combined catch limit (CCL) in net pounds is:	then the area 3A annual commercial allocation is:
<10,000,000 lb	81.1% of the Area 3A CCL.
≥10,000,000 and ≤10,800,000 lb	the Area 3A CCL minus a fixed 1,890,000-lb allocation to the charter halibut fishery.
>10,800,000 and ≤20,000,000 lb	82.5% of the Area 3A CCL.
>20,000,000 and ≤25,000,000 lb	the Area 3A CCL minus a fixed 3,500,000-lb allocation to the charter halibut fishery.
>25,000,000 lb	86.0% of the Area 3A CCL.

TABLE 3 TO SUBPART E OF PART 300—DETERMINATION OF COMMISSION REGULATORY AREA 2C ANNUAL CHARTER HALIBUT ALLOCATION FROM THE ANNUAL COMBINED CATCH LIMIT

If the area 2C annual combined catch limit for halibut in net pounds is:	then the area 2C annual charter allocation is:
<5,000,000 lb	18.3% of the Area 2C CCL.
≥5,000,000 and ≤5,755,000 lb	915,000 lb.
>5,755,000 lb	15.9% of the Area 2C CCL.

TABLE 4 TO SUBPART E OF PART 300—DETERMINATION OF COMMISSION REGULATORY AREA 3A ANNUAL CHARTER HALIBUT ALLOCATION FROM THE ANNUAL COMBINED CATCH LIMIT

If the area 3A annual combined catch limit (CCL) for halibut in net pounds is:	then the area 3A annual charter allocation is:
<10,000,000 lb	18.9% of the Area 3A annual combined catch limit.
≥10,000,000 and ≤10,800,000 lb	1,890,000 lb.
>10,800,000 and ≤20,000,000 lb	17.5% of the Area 3A annual combined catch limit.
>20,000,000 and ≤25,000,000 lb	3,500,000 lb.
>25,000,000 lb	14.0% of the Area 3A annual combined catch limit.

50 CFR Chapter VI

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 9. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.;* 1801 *et seq.;* 3631 *et seq.;* Pub. L. 108–447.

■ 10. In § 679.2, revise the definitions of ''Eligible community resident'', ''IFQ equivalent pound(s)'', ''IFQ fee liability'', and ''IFQ standard ex-vessel value'' to read as follows:

§ 679.2 Definitions.

* * * * *

Eligible community resident means:

(1) For purposes of the IFQ Program, any individual who:

(i) Is a citizen of the United States;

(ii) Has maintained a domicile in a rural community listed in Table 21 to this part for the 12 consecutive months immediately preceding the time when the assertion of residence is made, and who is not claiming residency in another community, state, territory, or country, except that residents of the Village of Seldovia shall be considered to be eligible community residents of the City of Seldovia for the purposes of eligibility to lease IFQ from a CQE; and

(iii) Is an IFQ crew member.

(2) For purposes of the Area 2C and Area 3A catch sharing plan (CSP) in § 300.65(c) of this title, means any individual or non-individual entity who:

(i) Holds a charter halibut permit as defined in § 300.61 of this title;

(ii) Has been approved by the Regional Administrator to receive GAF, as defined in § 300.61 of this title, from a CQE in a transfer between IFQ and GAF pursuant to § 300.65(c)(5)(ii) of this title; and

(iii) Begins or ends every charter vessel fishing trip, as defined in § 300.61 of this title, authorized by the charter halibut permit issued to that person, and on which halibut are retained, at a location(s) within the boundaries of the community represented by the CQE from which the GAF were received. The geographic boundaries of the eligible community will be those defined by the United States Census Bureau.

* * * * *

IFQ equivalent pound(s) means the weight amount, recorded in pounds and calculated as round weight for sablefish and headed and gutted weight for halibut for an IFQ landing or for estimation of the fee liability of halibut landed as guided angler fish (GAF), as defined in § 300.61 of this title. Landed GAF are converted to IFQ equivalent pounds as specified in § 300.65(c) of this title.

IFQ fee liability means that amount of money for IFQ cost recovery, in U.S. dollars, owed to NMFS by an IFQ permit holder as determined by multiplying the appropriate standard ex-vessel value or, for non-GAF landings, the actual ex-vessel value of his or her IFQ halibut or IFQ sablefish landing(s), by the appropriate IFQ fee percentage and the appropriate standard ex-vessel value of landed GAF derived from his or her IFQ by the appropriate IFQ fee percentage.

* * * * *

IFQ standard ex-vessel value means the total U.S. dollar amount of IFQ halibut or IFQ sablefish landings as calculated by multiplying the number of landed IFQ equivalent pounds plus landed GAF in IFQ equivalent pounds by the appropriate IFQ standard price determined by the Regional Administrator.

* * * * *

■ 11. In § 679.4:

■ a. Add paragraph (a)(1)(xv); and

■ b. Revise paragraph (a)(2) to read as follows:

§ 679.4 Permits.

(a) * * *

(1) * * *

If program permit type is:	Permit is in effect from issue date through the end of:	For more information, see . . .
* * *	* *	* *
(xv) Guided sport halibut fishery permits:		
(A) Charter halibut permit	Indefinite	§ 300.67 of this title.
(B) Community charter halibut permit	Indefinite	§ 300.67 of this title.
(C) Military charter halibut permit	Indefinite	§ 300.67 of this title.
(D) Guided Angler Fish (GAF) permit	Until expiration date shown on permit.	§ 300.65 of this title.

(2) *Permit and logbook required by participant and fishery.* For the various types of permits issued, refer to § 679.5 for recordkeeping and reporting requirements. For subsistence and GAF permits, refer to § 300.65 of this title for recordkeeping and reporting requirements.

* * * * *

■ 12. In § 679.5, revise paragraphs (l)(7)(i) and (ii) to read as follows:

§ 679.5 Recordkeeping and reporting (R&R).

* * * * *

(l) * * *

(7) * * *

(i) *IFQ Registered Buyer Ex-vessel Value and Volume Report*—(A) *Requirement.* An IFQ Registered Buyer that also operates as a shoreside processor and receives and purchases IFQ landings of sablefish or halibut must submit annually to NMFS a complete IFQ Registered Buyer Ex-vessel Value and Volume Report as described in this paragraph (l) and as provided by NMFS for each reporting period, as described at paragraph (1)(7)(i)(E), in which the Registered Buyer receives IFQ fish.

(B) *Due date.* A complete IFQ Registered Buyer Ex-vessel Value and Volume Report must be postmarked or received by the Regional Administrator by October 15 following the reporting period in which the IFQ Registered Buyer receives the IFQ fish.

(C) *Completed application.* NMFS will process an IFQ Registered Buyer Ex-vessel Value and Volume Report provided that a paper or electronic report is completed by the Registered Buyer, with all applicable fields accurately filled in, and all required additional documentation is attached.

(*1*) *Certification, Electronic submittal.* NMFS ID and password of the IFQ Registered Buyer; or

(*2*) *Certification, Non-electronic submittal.* Printed name and signature of the individual submitting the IFQ Registered Buyer Ex-vessel Value and Volume Report on behalf of the IFQ Registered Buyer, and date of signature.

(D) *Submission address.* The IFQ Registered Buyer must complete an IFQ Registered Buyer Ex-vessel Value and Volume Report and submit by mail to: Administrator, Alaska Region, NMFS, Attn: RAM Program, P.O. Box 21668, Juneau, AK 99802–1668; by fax to: (907) 586–7354; or electronically at *http://alaskafisheries.noaa.gov.* Report forms are available on the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov,* or by contacting NMFS at (800) 304–4846, Option 2.

(E) *Reporting period.* The reporting period of the IFQ Registered Buyer Ex-vessel Value and Volume Report shall extend from October 1 through September 30 of the following year, inclusive.

(ii) *IFQ Permit Holder Fee Submission Form*—(A) *Applicability.* An IFQ permit holder who holds an IFQ permit against which a landing was made must submit to NMFS a complete IFQ Permit Holder Fee Submission Form provided by NMFS.

(B) *Due date and submittal.* A complete IFQ Permit Holder Fee Submission Form must be postmarked or received by the Regional Administrator not later than January 31 following the calendar year in which any IFQ landing was made.

(C) *Completed application.* NMFS will process an IFQ Permit Holder Fee Submission Form provided that a paper or electronic form is completed by the permit holder, with all applicable fields accurately filled in, and all required additional documentation is attached.

(D) *IFQ landing summary and estimated fee liability.* NMFS will provide to an IFQ permit holder an IFQ Landing and Estimated Fee Liability page as required by § 679.45(a)(2). The IFQ permit holder must either accept the accuracy of the NMFS estimated fee liability associated with his or her IFQ landings for each IFQ permit, or calculate a revised IFQ fee liability in accordance with paragraph (l)(7)(ii)(E) of this section. The IFQ permit holder may calculate a revised fee liability for all or part of his or her IFQ landings.

(E) *Revised fee liability calculation.* To calculate a revised fee liability, an IFQ permit holder must multiply the IFQ percentage in effect by either the IFQ actual ex-vessel value or the IFQ standard ex-vessel of the IFQ landing. If parts of the landing have different values, the permit holder must apply the appropriate values to the different parts of the landings.

(F) *Documentation.* If NMFS requests in writing that a permit holder submit documentation establishing the factual basis for a revised IFQ fee liability, the permit holder must submit adequate documentation by the 30th day after the date of such request. Examples of such documentation regarding initial sales transactions of IFQ landings include valid fish tickets, sales receipts, or check stubs that clearly identify the IFQ landing amount, species, date, time, and ex-vessel value or price.

(G) *Reporting period.* The reporting period of the IFQ Permit Holder Fee Submission Form shall extend from January 1 to December 31 of the year prior to the January 31 due date.

* * * * *

■ 13. In § 679.40, revise the introductory text and paragraph (c)(1) to read as follows:

§ 679.40 Sablefish and halibut QS.

The Regional Administrator shall annually divide the annual commercial fishing catch limit of halibut as defined in § 300.61 of this title and published in the **Federal Register** pursuant to § 300.62 of this title, among qualified halibut quota share holders. The Regional Administrator shall annually divide the TAC of sablefish that is apportioned to the fixed gear fishery pursuant to § 679.20, minus the CDQ reserve, among qualified sablefish quota share holders.

* * * * *

(c) *Calculation of annual IFQ allocation*—(1) *General.* (i) The annual allocation of halibut IFQ to any person (person p) in any IFQ regulatory area (area a) will be equal to the product of the annual commercial catch limit as defined in § 300.61 of this title, after adjustment for purposes of the Western Alaska CDQ Program, and that person's QS divided by the QS pool for that area. Overage adjustments will be subtracted from a person's IFQ pursuant to paragraph (d) of this section; underage adjustments will be added to a person's IFQ pursuant to paragraph (e) of this section. Expressed algebraically, the annual halibut IFQ allocation formula is as follows:

IFQ_{pa} = [(fixed gear TAC_a − CDQ $reserve_a$) × (QS_{pa}/QS $pool_a$)] − overage adjustment of IFQ_{pa} + underage adjustment of IFQ_{pa}.

(ii) The annual allocation of sablefish IFQ to any person (person p) in any IFQ regulatory area (area a) will be equal to the product of the TAC of sablefish by fixed gear for that area (after adjustment for purposes of the Western Alaska CDQ Program) and that person's QS divided by the QS pool for that area. Overage adjustments will be subtracted from a person's IFQ pursuant to paragraph (d) of this section; underage adjustments will be added to a person's IFQ pursuant to paragraph (e) of this section. Expressed algebraically, the annual IFQ allocation formula is as follows:

IFQ_{pa} = [(fixed gear TAC_a − CDQ $reserve_a$) × (QS_{pa}/QS $pool_a$)] − overage adjustment of IFQ_{pa} + underage adjustment of IFQ_{pa}.

* * * * *

■ 14. In § 679.41, add paragraph (a)(3) to read as follows:

§ 679.41 Transfer of quota shares and IFQ.

(a) * * *

(3) Any transaction involving a transfer between IFQ and guided angler fish (GAF), as defined in § 300.61 of this title, is governed by regulations in § 300.65(c) of this title.

* * * * *

■ 15. In § 679.42 revise paragraphs (f)(1)(i), (f)(1)(ii), and (f)(6) to read as follows:

§ 679.42 Limitations on use of QS and IFQ.

* * * * *

(f) * * *

(1) * * *

(i) *IFQ regulatory Area 2C.* 599,799 units of halibut QS, including halibut QS issued as IFQ and transferred to GAF, as defined in § 300.61 of this title.

(ii) *IFQ regulatory area 2C, 3A, and 3B.* 1,502,823 units of halibut QS, including halibut QS issued as IFQ and transferred to GAF, as defined in § 300.61 of this title.

* * * * *

(6) No individual that receives IFQ derived from halibut QS held by a CQE, including GAF as defined in § 300.61 of this title, may hold, individually or collectively, more than 50,000 pounds (22.7 mt) of IFQ halibut, including IFQ halibut received as GAF, derived from any halibut QS source.

* * * * *

■ 16. In § 679.45:

■ a. Remove and reserve paragraph (c); and

■ b. Revise paragraphs (a)(1), (a)(2), (a)(3), (a)(4)(i) through (iii), (b), (d)(2) heading, (d)(2)(i)(A) through (C), (d)(2)(ii), (d)(3)(i), (d)(4), (e), and (f) to read as follows:

§ 679.45 IFQ cost recovery program.

(a) * * *

(1) *Responsibility.* An IFQ permit holder is responsible for cost recovery fees for landings of his or her IFQ halibut and sablefish, including any halibut landed as guided angler fish (GAF), as defined in § 300.61 of this title, derived from his or her IFQ accounts. An IFQ permit holder must comply with the requirements of this section.

(2) *IFQ Fee Liability Determination*—(i) *General.* IFQ fee liability means a cost recovery liability based on the value of all landed IFQ and GAF derived from the permit holder's IFQ permit(s).

(A) Each year, the Regional Administrator will issue each IFQ permit holder a summary of his or her IFQ equivalent pounds landed as IFQ and GAF as part of the IFQ Landing and Estimated Fee Liability page described at § 679.5(l)(7)(ii)(D).

(B) The summary will include information on IFQ and GAF landings and an estimated IFQ fee liability using the IFQ standard ex-vessel value for IFQ and GAF landings. For fee purposes:

(*1*) Landings of GAF in IFQ regulatory area 2C or 3A are converted to IFQ equivalent pounds and assessed at the IFQ regulatory area 2C or 3A IFQ standard ex-vessel value.

(*2*) GAF that is returned to the IFQ permit holder's account pursuant to § 300.65(c) of this title, and subsequently landed as IFQ during the IFQ fishing year, is included in the IFQ fee liability and subject to fee assessment as IFQ equivalent pounds.

(C) The IFQ permit holder must either accept NMFS' estimate of the IFQ fee liability or revise NMFS' estimate of the IFQ fee liability using the IFQ Permit Holder Fee Submission Form described at § 679.5(l)(7)(ii), except that the standard ex-vessel value used to determine the fee liability for GAF is not subject to challenge. If the IFQ permit holder revises NMFS' estimate of his or her IFQ fee liability, NMFS may request in writing that the permit holder submit documentation establishing the factual basis for the revised calculation. If the IFQ permit holder fails to provide adequate documentation on or by the 30th day after the date of such request, NMFS will determine the IFQ permit holder's IFQ fee liability based on standard ex-vessel values.

(ii) *Value assigned to GAF.* The IFQ fee liability is computed from all net pounds allocated to the IFQ permit holder that are landed, including IFQ landed as GAF.

(A) NMFS will determine the IFQ equivalent pounds of GAF landed in IFQ regulatory area 2C or 3A that are derived from the IFQ permit holder's account.

(B) The IFQ equivalent pounds of GAF landed in IFQ regulatory area 2C or 3A are multiplied by the standard ex-vessel value computed for that area to determine the value of IFQ landed as GAF.

(iii) The value of IFQ landed as GAF is added to the value of the IFQ permit holder's landed IFQ, and the sum is multiplied by the annual IFQ fee percentage to estimate the IFQ permit holder's IFQ fee liability.

(3) *Fee collection.* An IFQ permit holder with IFQ and/or GAF landings is responsible for collecting his or her own

fee during the calendar year in which the IFQ fish and/or GAF are landed.

(4) * * *

(i) *Payment due date.* An IFQ permit holder must submit his or her IFQ fee liability payment(s) to NMFS at the address provided at paragraph (a)(4)(iii) of this section not later than January 31 of the year following the calendar year in which the IFQ and/or GAF landings were made.

(ii) *Payment recipient.* Make payment payable to IFQ Fee Coordinator, OMI.

(iii) *Payment address.* Mail payment and related documents to: Administrator, Alaska Region, NMFS, Attn: IFQ Fee Coordinator, Office of Operations, Management, and Information, P.O. Box 21668, Juneau, AK 99802–1668; submit by fax to (907) 586–7354; or submit electronically through the NMFS Alaska Region Home Page at *http://alaskafisheries.noaa.gov*. If paying by credit card, ensure that all requested card information is provided.

* * * * *

(b) *IFQ ex-vessel value determination and use*—(1) *General.* An IFQ permit holder must use either the IFQ actual ex-vessel value or the IFQ standard ex-vessel value when determining the IFQ fee liability based on ex-vessel value, except that landed GAF are assessed at the standard values derived by NMFS. An IFQ permit holder must base all IFQ fee liability calculations on the ex-vessel value that correlates to the landed IFQ in IFQ equivalent pounds.

(2) *IFQ actual ex-vessel value.* An IFQ permit holder that uses actual ex-vessel value, as defined in § 679.2, to determine IFQ fee liability for landed IFQ must document actual ex-vessel value for each IFQ permit. The actual ex-vessel value cannot be used to assign value to halibut landed as GAF.

(3) *IFQ standard ex-vessel value*—(i) *Use of standard price.* An IFQ permit holder that uses standard ex-vessel value to determine the IFQ fee liability, as part of a revised IFQ fee liability submission, must use the corresponding standard price(s) as published in the **Federal Register**.

(ii) All landed GAF must be valued using the standard ex-vessel value for the year and for the IFQ regulatory area of harvest—Area 2C or Area 3A.

(iii) *Duty to publish list.* Each year the Regional Administrator will publish a list of IFQ standard prices in the **Federal Register** during the last quarter of the calendar year. The IFQ standard prices will be described in U.S. dollars per IFQ equivalent pound, for IFQ halibut and sablefish landings made during the current calendar year.

(iv) *Effective duration.* The IFQ standard prices will remain in effect until revised by the Regional Administrator by notification in the **Federal Register** based upon new information of the type set forth in this section. IFQ standard prices published in the **Federal Register** by NMFS shall apply to all landings made in the same calendar year as the IFQ standard price publication and shall replace any IFQ standard prices previously provided by NMFS that may have been in effect for that same calendar year.

(v) *Determination.* NMFS will apply the standard price, aggregated IFQ regulatory area 2C or 3A, to GAF landings. NMFS will calculate the IFQ standard prices to reflect, as closely as possible by month and port or port-group, the variations in the actual ex-vessel values of IFQ halibut and IFQ sablefish landings based on information provided in the IFQ Registered Buyer Ex-Vessel Value and Volume Report as described in § 679.5(l)(7)(i). The Regional Administrator will base IFQ standard prices on the following types of information:

(A) Landed net pounds by IFQ species, port-group, and month;

(B) Total ex-vessel value by IFQ species, port-group, and month; and

(C) Price adjustments, including IFQ retro-payments.

* * * * *

(d) * * *

(2) *Calculating the fee percentage.* * * *

(i) * * *

(A) The IFQ and GAF landings to which the IFQ fee will apply;

(B) The ex-vessel value of that landed IFQ and GAF; and

(C) The costs directly related to the management and enforcement of the IFQ Program, which include GAF costs.

(ii) *Methodology.* NMFS must use the following equation to determine the fee percentage:

$100 \times (DPC/V)$

Where:

''DPC'' is the direct program costs for the IFQ fishery for the previous fiscal year, and

''V'' is the ex-vessel value determined for IFQ landed as commercial catch or as GAF subject to the IFQ fee liability for the current year.

(3) * * *

(i) *General.* During or before the last quarter of each calendar year, NMFS shall publish the IFQ fee percentage in the **Federal Register**. NMFS shall base any IFQ fee liability calculations on the factors and methodology in paragraph (d)(2) of this section.

* * * * *

(4) *Applicable percentage.* The IFQ permit holder must use the IFQ fee percentage in effect for the year in which the IFQ and GAF landings are made to calculate his or her fee liability for such landed IFQ and GAF. The IFQ permit holder must use the IFQ fee percentage in effect at the time an IFQ retro-payment is received by the IFQ permit holder to calculate his or her IFQ fee liability for the IFQ retro-payment.

(e) *Non-payment of fee.* (1) If an IFQ permit holder does not submit a complete IFQ Permit Holder Fee Submission Form and corresponding payment by the due date described in § 679.45(a)(4), the Regional Administrator will:

(i) *Send Initial Administrative Determination (IAD).* Send an IAD to the IFQ permit holder stating that the IFQ permit holder's estimated fee liability, as calculated by the Regional Administrator and sent to the IFQ permit holder pursuant to § 679.45(a)(2), is the amount of IFQ fee liability due from the IFQ permit holder. An IFQ permit holder who receives an IAD may appeal the IAD, as described in paragraph (h) of this section.

(ii) *Disapprove transfer.* Disapprove any transfer of GAF, IFQ, or QS to or from the IFQ permit holder in accordance with § 300.65(c) of this title and § 679.41(c), until the IFQ fee liability is reconciled, except that NMFS may return unused GAF to the IFQ permit holder's account from which it was derived on or after the automatic GAF return date.

(2) Upon final agency action determining that an IFQ permit holder has not paid his or her IFQ fee liability, as described in paragraph (f) of this section, any IFQ fishing permit held by the IFQ permit holder is not valid until all IFQ fee liabilities are paid.

(3) If payment is not received on or before the 30th day after the final agency action, the matter will be referred to the appropriate authorities for purposes of collection.

(f) *Underpayment of IFQ fee.* (1) When an IFQ permit holder has incurred a fee liability and made a timely payment to NMFS of an amount less than the NMFS estimated IFQ fee liability, the Regional Administrator will review the IFQ Permit Holder Fee Submission Form and related documentation submitted by the IFQ permit holder. If the Regional Administrator determines that the IFQ permit holder has not paid a sufficient amount, the Regional Administrator will:

(i) *Disapprove transfer.* Disapprove any transfer of GAF, IFQ, or QS to or from the IFQ permit holder in accordance with § 300.65(c) of this title and § 679.41(c), until the IFQ fee liability is reconciled, except that NMFS may return unused GAF to the IFQ permit holder's account from which it was derived 15 days prior to the closing of the commercial halibut fishing season each year.

(ii) *Notify permit holder.* Notify the IFQ permit holder by letter that an insufficient amount has been paid and that the IFQ permit holder has 30 days from the date of the letter to either pay the amount determined to be due or provide additional documentation to prove that the amount paid was the correct amount.

(2) After the expiration of the 30-day period, the Regional Administrator will evaluate any additional documentation submitted by an IFQ permit holder in support of his or her payment. If the Regional Administrator determines that the additional documentation does not meet the IFQ permit holder's burden of proving his or her payment is correct, the Regional Administrator will send the permit holder an IAD indicating that the permit holder did not meet the burden of proof to change the IFQ fee liability as calculated by the Regional Administrator based upon the IFQ standard ex-vessel value. The IAD will set out the facts and indicate the deficiencies in the documentation submitted by the permit holder. An IFQ permit holder who receives an IAD may appeal the IAD, as described in paragraph (h) of this section.

(3) If the permit holder fails to file an appeal of the IAD pursuant to § 679.43, the IAD will become the final agency action.

(4) If the IAD is appealed and the final agency action is a determination that additional sums are due from the IFQ permit holder, the IFQ permit holder must pay any IFQ fee amount determined to be due not later than 30 days from the issuance of the final agency action.

(5) Upon final agency action determining that an IFQ permit holder has not paid his or her IFQ fee liability, any IFQ fishing permit held by the IFQ permit holder is not valid until all IFQ fee liabilities are paid.

(6) If payment is not received on or before the 30th day after the final agency action, the matter will be referred to the appropriate authorities for purposes of collection.

* * * * *

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